SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. [redacted]
238

OLSON BODIES, INC., formerly GRUMMAN ALLIED INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Orion Bodies, Inc., formerly Grumman Allied Industries, Inc.,

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v.

National Labor Relations Board and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Orion Bodies, Inc., formerly Grumman Allied Industries, Inc. (hereinafter the "Company"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (Appendix A, pp. 1a-7a) is reported at 620 F.2d 1107. The National Labor Relations Board's Decision and Order (Appendix C, pp. 11a-12a) are reported at 170 N.L.R.B. No. 34; the Trial Examiner's Decision (Appendix C, pp. 13a-27a) is not

officially reported. The Regional Director's Supplemental Decision and Certification of Representative (Appendix C, pp. 28a-42a) in the related representation case is not officially reported.

Jurisdiction

The judgment of the Court of Appeals (Appendix B, pp. 8a-9a) was entered on February 3, 1970, and the Company's timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 4, 1970 (Appendix B, p. 10a). By order dated May 28, 1970, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 9, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether, under Section 10(c) of the National Labor Relations Act, an employer may be found guilty of an unfair labor practice based on a refusal to bargain where the Board has never reviewed the findings of fact made by the Regional Director in the underlying representation proceeding?

2. Whether employees who are prevented from attending the polls on account of illness are entitled to cast absentee or home ballots in a National Labor Relations Board representation election where timely request has been made?

3. Whether there is a denial of procedural due process of law guaranteed by the Fifth Amendment, as well as a violation of the National Labor Relations Board's Rules and Regulations, where that agency's administrative procedure denies an employer a right to a hearing where

there are material and substantial disputed issues of fact and, in addition, such procedure denies the employer access to information derived from an *ex parte* investigation by a Regional Director and relied upon by him?

Constitutional Provisions, Statutes and Rules Involved

The relevant provisions of the United States Constitution, the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 *et seq.*), and the National Labor Relations Board's Rules and Regulations (29 C.F.R. §§ 102.1 *et seq.*) are set forth in Appendix D, pp. 43a-49a.

Statement of the Case

This case arises out of a representation election held on February 17, 1967 at the Company's Athens, New York truck body plant. Prior to the election, counsel for the Company requested that the Regional Director provide an alternative means of voting for certain eligible employees who were ill and likely to be unable to appear in person at the polls to vote. The Company's request was made following an inquiry by one of these employees and was denied (R. 133).*

There were 220 votes cast in the election, with 110 votes in favor of the Union** and 109 against (Appendix C, p. 28). The remaining ballot, cast by William Davenport, was challenged by the Board's agent on the ground that Daven-

* "R" references are to the Joint Appendix filed in the Court of Appeals; a copy has also been filed in this Court.

** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW").

port's name did not appear on the eligibility list (Appendix C, p. 29a). The Company claimed that Davenport was a plant clerical employee and, therefore, that his ballot should be counted. The Company also filed an objection to the election with the Regional Director, claiming that the four ill employees should have been given the opportunity to vote by absentee or home ballot (R. 130-31).

The Regional Director conducted an investigation into the question of Davenport's eligibility (Appendix C, p. 29a). Although the Regional Director granted the Company's request to submit affidavits in addition to affidavits taken by the Regional Director, he denied its request for a hearing.

Upon the conclusion of his *ex parte* investigation, the Regional Director issued a Supplemental Decision and Certification of Representative in which he concluded that Davenport was not a plant clerical employee and, hence, not eligible to vote. The Regional Director also overruled the objection concerning the ill employees (Appendix C, pp. 29a-37a, 38a).

Following the certification, the Company filed a Request for Review* of the Regional Director's Supplemental Decision and Certification of Representative, urging that Davenport's ballot had been erroneously excluded and that the ill employees should have been allowed to vote. In addition, the Company requested the Board to order the Regional Director to conduct a hearing into the disputed issues of fact concerning Davenport's eligibility (R. 148-82). On May 23, 1967, the Board denied the request as raising "no substantial issues warranting review" (R. 223).

In an effort to obtain review by the Board of the Regional Director's Supplemental Decision and Certification of Rep-

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* The request was made pursuant to 29 C.F.R. § 102.67(c), which provides that review will be granted only upon a showing of "compelling reasons" (Appendix D, p. 47a).

resentative, the Company declined to bargain with the Union, and an unfair labor practice complaint subsequently issued (R. 227). In its answer, the Company renewed its contention that Davenport belonged in the unit, and reiterated its point concerning the ill employees (R. 232). The Company also requested the Trial Examiner to conduct a hearing so as to permit the introduction of evidence with respect to the question of Davenport's eligibility. The Trial Examiner, however, refused to consider the question of Davenport's eligibility on the ground that he was precluded from doing so by the Board's "rule against relitigation" (Appendix C, pp. 17a-21a). The Company filed timely exceptions to the Trial Examiner's decision (R. 22). On April 23, 1968, the Board issued a Decision and Order, 170 N.L.R.B. No. 34, adopting the findings, conclusion and recommendations of the Trial Examiner (Appendix C, pp. 11a-12a), and directing the Company to bargain with the Union.

The Court of Appeals granted enforcement of the Board's order, holding that despite its earlier decision in *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB*, 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969), the Board was not required to review the Regional Director's findings of fact in the Supplemental Decision and Certification of Representative before an employer may be found guilty of an unfair labor practice based on a refusal to bargain (Appendix A, pp. 6a-7a). It also held that a hearing on Davenport's status was not required (Appendix A, p. 6a). Finally, the Court of Appeals refused to overturn the Regional Director's determination that the four ill employees were not entitled to vote by absentee or home ballot (Appendix A, p. 4a).

Reasons for Granting the Writ

I.

Under Section 10(e) of the National Labor Relations Act, the Board was required to review the Regional Director's findings of fact before concluding that an unfair labor practice had been committed.

The Court of Appeals' decision approves a procedure whereby the employer is deprived of the right of review by the Board and may be found guilty of an unfair labor practice where the Board has never reviewed the findings of fact made by the Regional Director in a prior representation proceeding upon which the unfair labor practice complaint depends. Such procedure is directly contrary to Section 10(e) of the National Labor Relations Act, which requires that the Board itself—rather than a Regional Director—decide whether an unfair labor practice has been committed. The question presented—whether the 1959 amendments to Section 3(b) were intended to override the provisions of Section 10(e)—is of inestimable importance, since the Court of Appeals' decision seriously jeopardizes the right to obtain Board review of a Regional Director's representation decision. There is a clear conflict among the Courts of Appeals on this question, and it has never been directly decided by this Court.

1. In 1959, Congress amended Section 3(b) to permit the Board to delegate to its Regional Directors its power "under section 9 to determine the unit appropriate for the purposes of collective bargaining". The Board has adopted rules, based on this authority, delegating its power to decide representation issues to its Regional Directors, subject to discretionary review by the Board. The rules provide

for review only upon one or more of the following grounds (29 C.F.R. § 102.67(c), Appendix D, pp. 47a-48a):

> "(1) That a substantial question of law or policy is raised because of (i) the absence, or (ii) a departure from, officially reported Board precedent.
>
> "(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> "(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> "(4) That there are compelling reasons for reconsideration of an important Board rule or policy."

Prior to 1959, the issues in a Section 9 representation proceeding, as well as those in a Section 10 unfair labor practice proceeding, were determined by the Board itself. Since this meant that the same representation question would be before the Board twice, the Board adopted a "rule against relitigation" precluding relitigation in an unfair labor practice proceeding of issues which were, or should have been, raised during representation proceedings.* The "rule against relitigation" was approved in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146 (1941), a case involving a refusal to bargain following a representation election,

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* The rule against "relitigation" is codified at 29 C.F.R. § 102.67(f) (Appendix D, p. 48a):

> "The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues."

where this Court stated that the representation and unfair labor practice proceedings "are really one", *id.* at 158, and "a single trial of the [representation] issue is enough." *Id.* at 162.

In *Pittsburgh Plate Glass*, however, the Board did in fact review the evidence produced at the representation hearing. *Id.* at 153-54. In contrast, the Board below refused to review the merits of the Regional Director's decision in the representation proceeding (R. 223), and, relying on its "rule against relitigation", refused to review the Regional Director's decision in the unfair labor practice proceeding (Appendix C, pp. 17a-21a). The Company has thus been found guilty of an unfair labor practice without the Board having considered even *once* the facts concerning Davenport. This is wholly inconsistent with the holding of *Pittsburgh Plate Glass*, which appears to require the Board to review the representation decision at least once before concluding the employer has violated Section 8(a)(5).

2. There is a direct conflict among the Courts of Appeals. In *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB*, *supra*, the Second Circuit refused to enforce the Board's order where it had not reviewed the Regional Director's decision, holding that the Board itself must decide whether an unfair labor practice has been committed:

> "The very fact that the Board has great discretion in making judgments, *cf.* Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953), especially in representation matters, N.L.R.B. v. A.J. Tower Co., 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946), indicates a legislative purpose to confer final authority in these situations on the Board itself—not a subdelegatee. . . . In an unfair practice proceeding, the

> Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members." 409 F.2d at 680.

Similarly, the Fourth Circuit, in accord with *Pepsi-Cola*, has held that the Board must review the record in the representation proceeding before making its own decision in the unfair labor practice proceeding. *NLRB* v. *Clement-Blythe Companies*, 415 F.2d 78 (4th Cir. 1969). The language of *Clement-Blythe* is particularly apt here:

> "[I]n the absence of a *de novo* hearing, the Board must thoroughly review the record before the Regional Director and make its own decision." 415 F.2d at 82.

However, in *NLRB* v. *Magnesium Casting Co.*, —— F.2d —— (1st Cir. May 21, 1970), the First Circuit explicitly refused to follow the Second Circuit's decision in the *Pepsi-Cola* case. It held that the Board was not required to review the Regional Director's findings of fact before concluding that an employer had committed an unfair labor practice by its admitted refusal to bargain. Holding that the procedure followed by the Board "satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness" *id.* at ——, the court stated:

> "Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the [Regional] Director's determination—when not set aside by the Board—is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded." *Id.* at ——.

In *Magnesium Casting*, the First Circuit characterized the solution reached in the instant case as the least satisfactory of all:

> "The Second Circuit's recent effort *N.L.R.B.* v. *Olson Bodies, Inc.*, 420 F. 2d at 1180—to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue 'is difficult and requires a fine-drawn balancing of facts and law'. We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of 'supervisory' status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress. We conclude that the Board's expertise was brought to bear to the extent required by section 3(d) when it denied review of the Regional Director's determination." *Id.* at ——.

There is a clear conflict between the decisions of the Second and Fourth Circuits in *Pepsi-Cola* and *Clement-Blythe*, respectively, and the decision of the First Circuit in *Magnesium Casting*. There is also a clear conflict between the holding of the Second Circuit in this case and that of the Fourth Circuit in *Clement-Blythe*. The Courts of Appeals are thus divided on the important question of how much finality should be accorded a Regional Director's

representation decision, and they are likely to remain divided until the question is answered authoritatively by this Court.

We have been informed by counsel for the Magnesium Casting Company that a petition for a writ of certiorari will definitely be filed in *NLRB* v. *Magnesium Casting Company*. In the light of this fact, this Court may wish to hold the determination of whether or not to grant this petition so as to be able to consider it together with the petition in *Magnesium Casting*.

III.

In representation elections employees who are unable to attend the polls on account of illness are entitled to vote by absentee or home ballot where timely request has been made.

In holding that the courts should not interfere in the conduct of representation elections, even where eligible employees have been denied the right to vote (Appendix A, p. 4a), the Court of Appeals has taken a position wholly at odds with the decisions of this Court holding that the rights of individual employees under the National Labor Relations Act are entitled to judicial protection. See, *e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Humphrey* v. *Moore*, 375 U.S. 335 (1964). The Court of Appeals' opinion is also at odds with the recent decisions of this Court involving the right to vote in political elections. See, *e.g.*, *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

The right to vote in representation elections by means of absentee ballot would seem to be protected by Sections

7 and 9(b) of the National Labor Relations Act. Section 7 provides that employees "shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . and shall also have the right to refrain from any and all such activities . . ." 29 U.S.C. § 157. Implementation of the rights conferred by Section 7, as the Board itself has recognized, "requires that all eligible voters, not merely a representative number, be given the opportunity to vote." *Star Baking Co.*, 119 N.L.R.B. 835, 836 (1957). Section 9(b) provides that the Board shall assure to employees "the fullest freedom" in the exercise of these rights.

In addition to the applicable statutory requirements, the right to vote in representation elections would seem to have constitutional underpinnings. The right to choose a bargaining representative is the right to participate in "a system of industrial self-government." *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Industrial democracy is itself a prerequisite to political democracy. As Dean Shulman has observed:

> "Collective bargaining is today . . . the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv.L.Rev. 999, 1002 (1955).

This Court has been particularly zealous in protecting the right to vote in political elections. The right to vote, as this Court remarked in *Carrington* v. *Rash*, is "close to the core of our constitutional system." 380 U.S. 89, 96.

This Court should be equally zealous to protect the right to vote in representation elections. To paraphrase the language of this Court, no right is more precious to the individual employee than that of having a voice in the selection of those who will determine the terms and conditions under which he is employed. *See Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964).

Apart from considerations of industrial democracy, selection of a bargaining representative has important practical consequences for the individual employee. He loses entirely his freedom of individual contract. He is barred from bargaining on his own behalf or through any other representative, and he is bound by the agreement made by the majority union even when he is not a member, prefers individual bargaining, and opposes the specific terms negotiated by the union. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). In recognition of the fact that the collective bargaining agreement will necessarily govern the entire employment relationship, this Court has held that the individual employee, in voting for a bargaining representative, shall have "complete and unfettered freedom of choice". *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 588 (1941).

The Regional Director (whose decision was in turn affirmed by the Board) denied the request for absentee or home ballots solely on the ground that the "Board has long held that only employees who present themselves in person at the polls shall be eligible to vote in manually conducted elections" (Appendix C, p. 38a). "The long-held policy" alluded to by the Regional Director appears, in fact, not to exist. To the contrary, the Board itself has frequently allowed employees who have been prevented from attending the polling place to vote by absentee or home ballot. Directly in point is *Growers Warehouse Co., Inc.*, 114 N.L.R.B. 1568 (1955), where the employer sought

to set aside the election on the ground that an ill employee had been allowed to vote at home. The Board rejected the argument, holding that "balloting, by those unable to attend the polling place, at some other place, is entirely proper if attended by appropriate safeguards". 114 N.L.R.B. at 1572-73.

The Board has also allowed the use of mail ballots when employees have been prevented from attending the polls due to business reasons. See, *e.g.*, *NLRB* v. *Groendyke Transport, Inc.*, 372 F.2d 137, 142 (10th Cir.), *cert. denied*, 387 U.S. 932 (1967) (mail ballots permitted where truck drivers "could not be scheduled to vote at a single location within a reasonable period of time)" and the numerous cases cited therein approving the use of a mail ballot. Even employees who have been on vacation have been allowed to vote by mail ballot. *E.I. duPont de Nemours & Co.*, 79 N.L.R.B. 345 (1948).

As the foregoing cases demonstrate, the Board has never held that the only persons entitled to vote in representation elections are those who are able to attend the polls.*

* While it is true that there have been instances where the Board has denied requests for absentee ballots, the Board has done so solely on the ground that the requests were not timely made. See, *e.g.*, *McFarling Bros. Midstate Poultry & Egg Co.*, 123 N.L.R.B. 1384, 1392 (1959) ("The Board has held that where election arrangements have been made for a manual election at a specified time and no timely request has been made for other arrangements, the Board will not set aside an election where sick or hospitalized employees have not voted"); *Franklin Stores Corp. of Daly City*, 117 N.L.R.B. 793, 795 (1957) ("The Board has previously held that where a stipulation for a consent election provides . . . for a manual election at a designated location, and no timely request is made for other arrangements, the request may properly be rejected"); *Red Owl Stores, Inc.*, 114 N.L.R.B. 176, 177 (1955) ("request . . . properly refused because the election stipulation provided for a manual election to be conducted in the back room of the Employer's store, and . . . no timely request had been made for a mail ballot"). Throughout these proceedings, however, the Board has never disputed the timeliness of the request for absentee or home voting for the ill employees here.

Indeed, where eligible persons have been prevented from attending the polls, the Board's usual practice has been to order new elections. See, *e.g.*, *Alterman—Big Apple, Inc.*, 116 N.L.R.B. 1078, 1079 (1956); *Verges Van Liners, Inc.*, 162 N.L.R.B. 1259, 1260 (1967). Where the Board has refused to take the necessary remedial action, the courts have frequently intervened to protect the rights of the individual employee. The leading case is *Shoreline Enterprise of America, Inc.* v. *NLRB*, 262 F.2d 933, 944 (5th Cir. 1959), involving the right to vote of four employees whose names had been excluded from a stipulated eligibility list, where the Fifth Circuit stated:

> "The National Labor Relations Board is not just an umpire to referee a game between an employer and a union. It is also a guardian of individual employees. Their voice, though still and small, commands a hearing. The interest of a rank-and-file worker in selecting an economic representative having the power to fix wages and working conditions is no less important than a citizen's interest in selecting a political representative. It is not necessary to decide that this interest is a right protected by the constitution. The National Labor Relations Act vests the Board with discretionary authority to conduct a fair election—fair for individual employees, as well as for the Company or for the Union. The Board abuses its discretion when it knowingly allows eligible employees to be disfranchised . . . whose votes would change the results of an election to decide upon a bargaining agent."

In holding that the "conduct of representation elections is the very archetype of a purely administrative function,

with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse" (Appendix A, p. 4a), the Court of Appeals badly misconstrues the import of *Shoreline Enterprise* and numerous other cases. See, *e.g.*, *NLRB* v. *Wilkening Mfg. Co.*, 207 F.2d 98 (3d Cir. 1953) (new election ordered when two eligible employees, who, due to circumstances beyond their control, were unable to come to the polls until shortly after they closed); *NLRB* v. *West Texas Utilities Co.*, 214 F.2d 732 (5th Cir. 1954).

The only conceivable justification for the Board's position here would seem to be that of administrative expediency. In *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965), however, this Court held that the right to vote in a political election may not be denied in the interest of "some remote administrative benefit", and the same should be true of the right to vote in a representation election.* It is noteworthy that in political elections involving a much larger electorate than the typical representation election, it is common to permit ill persons to vote by absentee ballot. See, *e.g.*, New York Election Law § 117a. In light of the fact that a bargaining representative, unlike a political representative, is elected for an indefinite period of time rather than a fixed term, the need for absentee or home voting would seem to be even greater in the case of representation elections. It

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* This Court also rejected the argument based on administrative expediency in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), where it was urged that a one-year residency requirement for welfare eligibility could be justified on the ground that it would facilitate the planning of the state welfare budget and would aid in eliminating fraudulent collection of benefits by non-residents and persons already receiving assistance in other states. In that case this Court stated that where certain basic rights are involved, official action which impinges on these rights will be judged not by the ordinary standards of Equal Protection but by "the stricter standard of whether it promotes a *compelling* state interest." 394 U.S. at 638 (emphasis in original).

should also be noted that a bargaining representative, once selected, is difficult to decertify or replace by another representative.

III.

The Regional Director was required to conduct a hearing on the disputed issues of fact in this case.

In holding that a hearing was not required where the Regional Director did not disclose certain of the evidence on which he relied, the Court of Appeals has endorsed a procedure which is violative of the most basic of the rights guaranteed by the due process clause of the Fifth Amendment—the right of a party affected by administrative action to be adequately informed of the evidence presented in the administrative proceeding and to be accorded an adequate opportunity to rebut this evidence and to confront and cross-examine witnesses. See, *e.g.*, *Goldberg* v. *Kelly*, —— U.S. —— (March 23, 1970); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 107 (1963) (concurring opinion of Mr. Justice Goldberg). The Court of Appeals' opinion is also in conflict with the decisions of various other Courts of Appeals holding that a hearing must be held where there are "substantial and material" factual issues in dispute. See, *e.g.*, *NLRB* v. *Capital Bakers, Inc.*, 351 F.2d 45 (3d Cir. 1965); *NLRB* v. *Sidran*, 181 F.2d 671 (5th Cir. 1950). This Court has not previously construed Section 102.69(c) of the Board's Rules and Regulations (Appendix D, p. 49a), which provides for hearings in such situations.

1. In rejecting the Company's contention that it was entitled to a hearing on the question of Davenport's eligibility, the Court of Appeals noted that it had sustained a similar

contention in *NLRB* v. *Joclin Mfg. Co.*, 314 F.2d 627 (2d Cir. 1963), but added that

> "the showing by the employer in that case concerning the need for a hearing was considerably more impressive than here. Respondent was given access to the affidavits taken by the Regional Director and opportunity, of which it fully availed itself, to submit additional material." (Appendix A, p. 6a).

While it is true that the Company was given access to some of the affidavits taken by the Regional Director and the opportunity to submit affidavits of its own, the fact remains that the Regional Director's determination was based in part on evidence obtained from witnesses whose testimony has never been made available to the Company. Thus, for example, the Regional Director began his Supplemental Decision by noting that the Union contended that "Davenport is a liaison man between the engineering and drafting departments and is not part of the production and maintenance unit" (Appendix C, p. 29a). The Company has never been supplied with the affidavit or statement in which this assertion is made, and thus it would seem that the Regional Director's determination was based at least in part on affidavits or statements of which the Company was not aware.

The *ex parte* nature of the Regional Director's investigation deprived the Company of its right to confront and cross-examine the persons who may have supplied this information. This in itself is a proper and sufficient basis for this Court to reverse the decision of the Court of Appeals. *Goldberg* v. *Kelly*, —— U.S. at ——. As this Court stated in *Greene* v. *McElroy*, 360 U.S. 474, 496-97 (1959):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that

> where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny."

See also *ICC* v. *Louisville & N.R.R. Co.*, 227 U.S. 88 (1913); *Willner* v. *Committee on Character and Fitness*, *supra*.

In *Goldberg* v. *Kelly*, this Court rejected the argument that the requirements of due process could be satisfied by providing an opportunity to submit affidavits, holding: "Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision." —— U.S. at ——. The holding of *Goldberg* v. *Kelly* is equally applicable here.

As a matter of plain logic, it is wholly unrealistic to expect a party to rebut—by affidavits or otherwise—evidence which has never been disclosed to it. As Mr. Justice Frankfurter remarked in his concurring opinion in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 171 (1951) secrecy has never been "congenial to truth-seeking".

2. A hearing was also required because there were "substantial and material" questions of fact in dispute. See 29 C.F.R. § 102.69(c); *NLRB* v. *Capital Bakers, Inc., supra*; *NLRB* v. *Sidran, supra*. One example of a disputed question of fact was that of Davenport's supervision. The Court of Appeals accepted the Regional Director's finding that Davenport was under the "immediate supervision of Turner, an engineer, whereas Biesel and Peters [the two plant clericals included in the unit] are supervised by Simmons" (Appendix A, p. 5a). This finding, however, is directly and specifically contradicted by four affidavits. The affidavit of Loar, the Senior Vice President and former manager of the plant, stated quite plainly:

> "Davenport works directly under Mr. Simmons, as do Biesel and Peters, though out of courtesy he might tell one of the engineers when he is leaving the area. No engineers have any authority over Davenport." (R. 195).

Similarly, Davenport himself stated: ". . . Mr. Simmons is my supervisor" (R. 222). Likewise, Simmons stated: "Mr. Davenport, as well as Mr. Biesel and Mr. Peters, report directly to me" (R. 210). Even Turner, who was found by the Regional Director to be Davenport's supervisor, disclaimed any such responsibility: "I am not Mr. Davenport's supervisor nor is he under the supervision of Clayton Reed, the Chief Engineer" (R. 212).

In discussing the Regional Director's findings of fact, the Court of Appeals noted that the Regional Director "permissibly found" that Davenport was not a member of the bargaining unit, relying, in part, on the finding that Turner was Davenport's supervisor (Appendix A, p. 5a). The question, however, is not whether this finding was supported by sufficient evidence, but whether there was a "substantial and material" disputed issue of fact, as evidenced

by affidavits specifically contradicting this finding, requiring a hearing for its resolution. The applicable rule was stated in *NLRB* v. *Capital Bakers, Inc.* as follows:

> "We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his finding, or whether the rejected evidence of respondent would overcome the findings; we are solely concerned with the fact that the offer and the findings raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing." 351 F.2d at 51.

The Court of Appeals' opinion is thus in direct conflict with the decision of the Third Circuit in *NLRB* v. *Capital Bakers, Inc.* In *Capital Bakers*, the Regional Director conducted an *ex parte* investigation into the eligibility of an employee whose ballot had been challenged on the ground that he was a supervisor and hence ineligible to vote. The Regional Director sustained the challenge, and the employer refused to bargain. In holding that a hearing was required, the Third Circuit held:

> "It is apparent that the status of the employee whose ballot was challenged presents a substantial factual issue. *The extent of the Regional Director's discussion of facts attests to its substance. The materiality is proven by the fact that this vote could determine the result.* Therefore, the failure to determine this issue on the basis of a hearing constitutes a clear abuse of discretion on the part of the Regional Director, which has been allowed to stand at the successive stages of the proceedings on the grounds that the original determination was not open to subsequent review. *Not only the Rules and Regulations, but due process of law demands that a hearing be held on this contested factual*

issue at some stage of the administrative proceeding . . . ." 351 F.2d at 51 (emphasis supplied).

Noting that Section 102.69(c) requires the Regional Director to hold a hearing where there are "substantial and material factual issues" in dispute, the Third Circuit stated:

> "The extensive nature of the Regional Director's report in which he details the results of his investigation of the supervisory nature of the duties of the challenged employee clearly establishes the existence of such 'substantial and material factual issues.' The printed record contains over five pages of discussion of the factual bases for his determination. *Yet all of the evidence upon which he relied is derived from statements which were not subject to cross-examination or confrontation or to any legal tests for determining their use or weight as evidence.*" *Id.* at 50 (emphasis supplied).

Similarly, in *NLRB* v. *Sidran*, where the Regional Director disallowed the ballots of six "bundle girls" without holding a hearing on their eligibility, the Fifth Circuit stated:

> "We are of opinion decision here must turn on the validity of the report of the Regional Director. It was admitted in evidence over respondent's objection in the hearing before the Trial Examiner, and considered as competent legal evidence binding on respondent upon review by the Board. The report was admittedly based upon an undisclosed *ex parte* investigation, and no hearing was ever held to support it. *Respondent had no opportunity to be heard, to examine and cross-examine witnesses, or to produce any evidence in his own behalf which might have tended to impeach or contradict the facts found by the Regional Director as the*

status of these challenged employees. Manifestly, the Board's action in considering such report was not within its discretionary power, but under the circumstances arbitrarily deprived respondent of a fair trial.

• • • • •

"Here, before ruling in favor of the union on the eligibility status of these challenged employees, it is without dispute that the Regional Director held no hearing of any kind, either formal or informal. Although the eligibility and representation issues were vital to the case, no testimony of witnesses was adduced on this score, no documentary evidence was received, nor was a transcript of any proceedings before the Regional Director preserved. *The record nowhere reveals what evidence he relied upon, how his investigation was conducted, or by what rules it was governed.* Moreover, we can find no authority sufficient to justify his action in this regard, and do not believe that any such valid authority exists." 181 F.2d at 673-74 (emphasis supplied).

In *NLRB* v. *Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968), the Fifth Circuit held that even where the parties do not dispute the underlying facts, a hearing may be necessary where the underlying facts are susceptible of more than one interpretation. In that case, the court noted that summary judgment is not proper where more than one inference may reasonably be drawn from the undisputed "historic facts", *id.* at 893, and indicated that Section 102.69(c) should be similarly construed. In holding that a hearing was not necessary because the "decision turned on the inference to be drawn from largely undisputed facts" (Appendix A, p. 6a), the Second Circuit has taken a view diametrically opposed to that of the Fifth Circuit.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

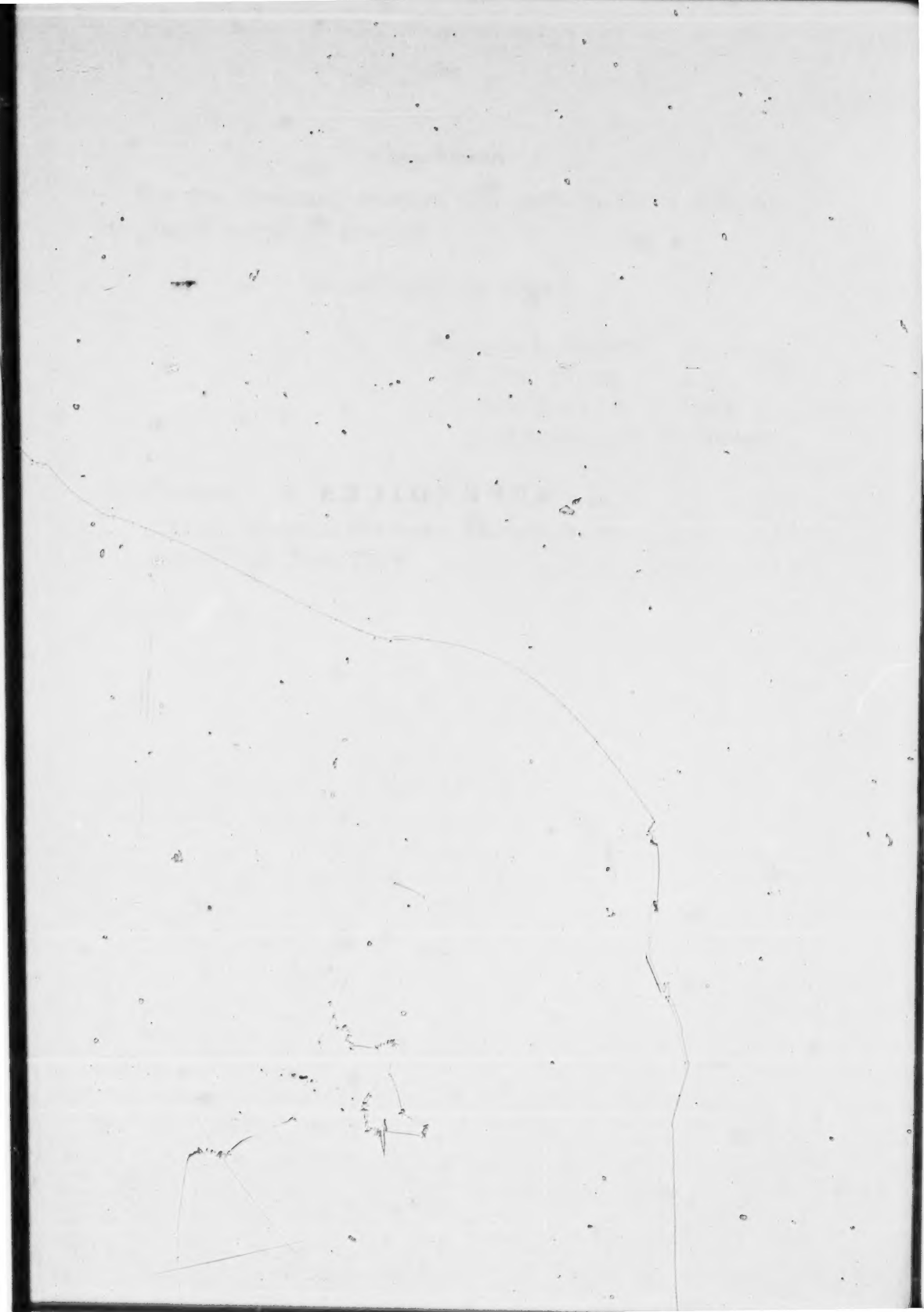
Respectfully submitted,

William L. Dennis
80 Pine Street
New York, N. Y. 10005
Attorney for Petitioner

Of Counsel:
Cahill, Gordon, Sonnett, Reindel & Ohl.
New York, New York

June 9, 1970

APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—September Term, 1969.

(Argued October 3, 1969 Decided January 6, 1970.)

Docket No. 33048

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—and—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Intervenor,

—v.—

OLSON BODIES, INC., Formerly GRUMMAN ALLIED INDUSTRIES, INC.,

Respondent.

Before:

FRIENDLY, SMITH and FEINBERG,

Circuit Judges.

Petition by the National Labor Relations Board to enforce an order directing respondent to bargain with a union certified as the result of a representation election. Enforcement granted.

LEONARD M. WAGMAN, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Herbert Fishgold, Attorney, National Labor Relations Board, of Counsel), *for Petitioner.*

BENJAMIN RUBENSTEIN, Esq., New York, New York, *Attorney for Intervenor.*

WILLIAM L. DENNIS, Esq. (Cahill, Gordon, Sonnett, Reindel & Ohl, New York, New York, and Henry G. Bisgaier, Jack L. Fox, Laurence T. Sorkin, Samuel M. Symonds, of Counsel), *for Respondent.*

FRIENDLY, *Circuit Judge*:

In September 1966, the UAW filed a petition for a Board conducted election at respondent's Athen's, N. Y. truck body plant. Respondent opposed this on the ground, no longer pressed, that the unit should include two plants in Michigan and Texas. The unit certified was

> All production and maintenance employees employed at the Employer's Athens, New York, truck manufacturing plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The Board denied a request for review, and an election was held on February 17, 1967.

The vote was exceedingly close. Two hundred and twenty votes were cast, with one hundred ten ballots in favor of the UAW and one hundred nine against. The

remaining ballot, cast by William Davenport, was challenged by the Board agent on the ground that Davenport's name did not appear on the eligibility list. Respondent protested to the Regional Director, claiming that Davenport was a plant clerical and, therefore, his ballot should not have been excluded. Respondent also objected to the Regional Director's failure to comply with its request on February 15 that absentee balloting or home voting in the presence of a Board, employer and union representative should be allowed for 15 eligible employees who were out because of illness. (Apparently, however, 11 of the 15 did come to the polls and vote.) Respondent's final objection was based on alleged union misconduct.

The Regional Director took affidavits from Davenport and Loar, a Vice President of respondent, concerning the former's duties. Respondent was allowed to examine these and to submit four other affidavits as well as additional ones from Davenport and Loar. The Regional Director issued a supplemental decision and certification, wherein he sustained the challenge to Davenport as not being a production or maintenance employee in the truck manufacturing plant, overruled the other objections, and certified the union. Respondent sought review by the Board, pursuant to §§102.67(c) and 102.69(c) of its Rules and Regulations, with respect to the sustaining of the challenge and the overruling of the objection concerning the ill employees. The facts about Davenport were set out in great detail, and apparently the affidavits were annexed.

On May 23, 1967, the Board denied the request as raising "no substantial issues warranting review." When respondent thereafter declined to bargain with the union, the General Counsel filed a complaint and moved for summary judgment. Opposing this, respondent sought a hearing on Davenport's status, reiterated its point concerning the ill

employees, and repeated its initial objections with respect to the bargaining unit. The Trial Examiner recommended the grant of summary judgment; the Board sustained this and entered the bargaining order which it here seeks to enforce.

We deal first with respondent's objection on the score of the Board's failure to arrange for absentee or home voting by the four ill employees. In its brief, the Board properly recognizes its concern that all employees eligible to vote should have a fair opportunity to do so. The conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse. See, e.g., *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324 (1946). The company had made no request for absentee or home voting by the ill employees until two days before the election, although its telegram recited that many of them had been ill for at least a month and some for over six months. We cannot say that the Regional Director's refusal to supplement the usual manual ballot procedures in this election in a small up-state New York town was such a violation of the rights of the employees as to render judicial intervention appropriate. See *International Tel. & Tel. Co.* v. *NLRB*, 294 F.2d 393 (9 Cir. 1961); see also note 1 *infra*.

No useful purpose would be served by detailed recital of the extensive evidence concerning Davenport. Employed in 1950 as a production employee, he was transferred in 1962 to the shop's production control department where he worked with two other men, Biesel and Peters, who were classified as plant clericals after the representation hearing before the Regional Director. In 1964 he was moved to the office occupied by engineers and draftsmen who, it is agreed, are not in the bargaining unit. His principal function has

been to make up bills of materials from information available in the engineering office. He is under the immediate supervision of Turner, an engineer, whereas Biesel and Peters are supervised by Simmons, who is also Turner's supervisor. The Regional Director permissibly found that "his duties appear to be mainly in support of the engineering department personnel," that his contacts with the production shop are through foremen, and that when he is on vacation, this part of his job is taken over by engineers or draftsmen. Some other bits and pieces of evidence pointed in one way, some in another.

We find particularly significant the position earlier taken by the company in the representation hearing. When the hearing officer asked who it contended were the production plant clericals, respondent's counsel did not name Davenport. On the other hand, there was extensive discussion about Biesel and Peters, and a third employee, Stacy. Considerable emphasis was placed on these employees' having their offices in the main production plant. Cf. *NLRB* v. *Clarostat Mfg. Co.*, 216 F.2d 525, 528 (1 Cir. 1954). It was thus quite natural that, while the decision and direction of election included these three in the unit, Davenport was not put in the eligible list. While this was not a consent election, as in *NLRB* v. *Joclin Manufacturing Co.*, 314 F.2d 627, 633 (2 Cir. 1963), where we said "the Board was not making an independent determination" but "was construing a contract," there was no disagreement that only the production and maintenance employees were to be included and there was apparently no dispute that plant clericals were "production and maintenance employees," although there was debate whether Biesel, Peters and Stacy were plant clericals. If the matter were regarded as otherwise doubtful, the company's own position thus would tip the scale decisively against our upsetting the decision that Daven-

port was not a plant clerical and therefore not within the unit.

Relying on *Joclin, supra*, the company contends that, be all this as it may, it was entitled to an evidentiary hearing with respect to Davenport's duties. However, as examination of the opinion reveals, 314 F.2d at 632-34, 635 (on rehearing), the showing by the employer in that case concerning the need for a hearing was considerably more impressive than here. Respondent was given access to the affidavits taken by the Regional Director and opportunity, of which it fully availed itself, to submit additional material. No issue of credibility is involved; decision turned on the inference to be drawn from largely undisputed facts, and neither the Board nor we have been told of significant additional material that could be presented. Under these circumstances we perceive no error in the Regional Director's determination that there were no "substantial and material factual issues .... which can be resolved only after a hearing," NLRB Rules and Regulations §102.69(c). See *NLRB* v. *Sun Drug Co.*, 359 F.2d 408 (3 Cir. 1966).

Respondent's final point is that because of the Board's refusal to review the Regional Director's decision and certification of election, remand is mandated by this court's recent decision in *Pepsi-Cola Bottling Co.* v. *NLRB*, 409 F.2d 676 (2 Cir.), *cert. denied*, —— U.S. —— (1969). Although the writer of this opinion is inclined to doubt whether *Pepsi-Cola* gave adequate recognition to the 1959 amendment of §3(b) of the National Labor Relations Act empowering the Board to delegate various powers to a regional director, and the pertinent legislative history, it is unnecessary to consider that question here.

Accepting *Pepsi-Cola* we do not regard it as making remand automatic whenever the Board has declined to review a decision of a regional director under powers

delegated to him pursuant to §3(b). This court was there dealing with an issue, whether distributors were employees or independent contractors, which, as the Board conceded, "is difficult and requires a fine-drawn balancing of facts and law," 409 F.2d at 679. See *N.L.R.B.* v. *United Ins. Co.*, 390 U.S. 254 (1968). The questions here were the refusal to arrange for absentee or home voting by ill employees and the correctness of the inference the Regional Director had drawn from largely undisputed facts relating to the work of a single employee. These are the very types of issues where the Board, like an appellate court, would properly defer to the judgment of the tribunal of first instance[1]—and also the kinds of issues where the desire of Congress to help the Board with its workload, see remarks of Senator Goldwater, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1856, would apply with peculiar force. We are convinced that a remand here for review of the Regional Director's decision would, in contrast to *Pepsi-Cola*, be "an idle and useless formality," *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 6 (1969) (opinion of Mr. Justice Fortas), accomplishing nothing save further delay.

Enforcement granted.

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[1] See, e.g., Twenty-Seventh Ann. Rep. of NLRB 82 (1962):

> Election details, such as the time, place and notice of an election, are left largely to the regional director. The Board does not interfere with the regional director's broad discretion in making arrangements for the conduct of elections except where the discretion has been abused. [Citing *Rohr Aircraft Corp.*, 136 N.L.R.B. 958 (1962).]

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 33,048

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Intervenor,

v.

OLSON BODIES, INC., formerly GRUMMAN ALLIED INDUSTRIES, INC.,

Respondent.

JUDGMENT

Before:

FRIENDLY, SMITH and FEINBERG,

Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against the Respondent, Olson Bodies, Inc., formerly Grumman Allied Industries, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 3, 1969, and has considered the briefs and transcript of record

filed in this cause. On January 6, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Olson Bodies, Inc., formerly Grumman Allied Industries, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against Respondent.

HENRY J. FRIENDLY
Judge, United States Court of Appeals for the Second Circuit

J. JOSEPH SMITH
Judge, United States Court of Appeals for the Second Circuit

Filed: February 3, 1970.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 33,048

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

OLSON BODIES, INC., formerly
GRUMMAN ALLIED INDUSTRIES, INC.,

Respondent,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Intervenor.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Olson Bodies, Inc., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

March 4, 1970

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 3-CA-3245

OLSON BODIES, INC., formerly
GRUMMAN ALLIED INDUSTRIES, INC.,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

DECISION AND ORDER

On December 6, 1967, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

170 N.L.R.B. No. 34

The Board has reviewed the rulings made by the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendation of the Trial Examiner.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the recommended Order of the Trial Examiner, and hereby orders that Respondent, Olson Bodies, Inc., formerly Grumman Allied Industries, Inc., Athens, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D. C., April 23, 1968.

John H. Fanning, *Member*
Howard Jenkins, Jr., *Member*
Sam Zagoria, *Member*
National Labor Relations Board

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 3-CA-3245

OLSON BODIES, INC., formerly
GRUMMAN ALLIED INDUSTRIES, INC.,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO.

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding[1]

CHARLES W. SCHNEIDER, Trial Examiner: Upon petition for certification as collective-bargaining representative filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, herein called the Union, and after a hearing before a duly designated hearing officer, the Regional Director for Region 3 of the Board on January 16, 1967, issued a Decision and Direction of Election in which he found, contrary to the contention of the Employer, that the production and maintenance employees at the truck manufacturing plant in Athens, New York, of Grumman Allied Industries, Inc., the Employer constituted an appropriate bargaining unit. The Employer had urged as

[1] In accordance with the General Counsel's request, administrative or official notice is taken of the representation proceeding, Case No. 3-RC-4023. See Section 9(d) of the National Labor Relations Act.

appropriate a unit including, additionally, truck manufacturing plants of the Employer in Sturgis, Michigan and Sherman, Texas, and its foundry in Athens.

On February 9, 1967 the Board denied the Employer's request for review of the Regional Director's Decision and Direction of Election on the ground that it raised no substantial issues warranting review.

Pursuant to the Decision and Direction of Election, an election by secret ballot was conducted on February 17, 1967, under the direction and supervision of the Regional Director for Region 3. The Union received a majority of the valid votes cast. Olson Bodies, Inc., formerly Grumman Allied Industries, Inc., herein called the Respondent, filed timely objections to the conduct of the election, and to conduct affecting the results of the election. A challenge to the ballot of one William Davenport being determinative of the election, the Regional Director investigated the challenge and the objections.

On April 14, 1967, the Regional Director issued a Supplemental Decision and Certification of Representative in which he found that the Respondent's objections raised no substantial or material factual issues with respect to the conduct of the election, and overruled said objections. He further sustained the challenge to the ballot of Davenport and certified the Union as the bargaining representative under the Act. Thereafter, the Employer's request for review of the Regional Director's Supplemental Decision and Certification of Representative was denied by direction of the Board on May 23, 1967, as raising no substantial issues warrantiyg review.

The Complaint Case

On June 13, 1967, the Union filed the unfair labor practice charge, and on July 18, 1967, the amended unfair labor

practice charge, involved in the instant case, in which charges it was alleged that since on or about June 9, 1967, and at all times thereafter, the Respondent has refused and continues to refuse to bargain with the Union.

On July 27, 1967, the General Counsel by the Regional Director of Region 3, issued a complaint alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union upon request. In due course the Respondent filed its answer to the complaint in which *inter alia*, it admitted allegations of the complaint with respect to jurisdiction, but denied the appropriateness of the unit, the validity of the election and the certification, the asserted request of the Union to bargain, and the Respondent's refusal.

On August 17, 1967, Counsel for the General Counsel filed a Motion for Summary Judgment and Issuance of Trial Examiner's Decision, and Argument in Support of said motion, contending that facts of official record and other facts submitted with the motion established the allegations of the complaint as a matter of law, and that therefore there is no necessity for a hearing. On August 25, 1967 counsel for the Union filed a Joinder in such motion.

In the meantime, on August 22, 1967, I issued an Order to Show Cause on General Counsel's Motion for Summary Judgment, in which the parties directed to show cause on or before September 7, 1967, as to whether or not the Motion for Summary Judgment should be granted. The Respondent has filed a Response to General Counsel's Motion for Summary Judgment.

Thereafter, under date of November 7, 1967 counsel for the General Counsel filed a Motion to Withdraw his Motion for Summary Judgment on the ground that the Union has filed additional charges against the Respondent alleg-

ing violations of Section 8(a)(1), (3) and (5) of the Act. (Case No. 3-CA-3226.) Upon an Order to Show Cause why such motion should not be granted, the Union on November 20, 1967 filed an Objection to the requested withdrawal. No responses to this order to show cause were filed by the General Counsel or the Respondent.

The objection of the Union asserts that there is no issue to be tried before a Trial Examiner, that the facts establish that the Respondent has refused to bargain collectively, and that therefore the motion for summary judgment, in which the Union had joined, should be granted.

Review of the record establishes the contentions of the Union. Under such circumstances the mere filing of additional charges of unfair labor practices by the Union against the Respondent does not *ipso facto* constitute adequate ground for the Trial Examiner to decline to make findings of established unfair labor practices. The General Counsel's Motion to Withdraw the Motion for Summary Judgment is therefore denied.

Ruling on Motion for Summary Judgment

The Respondent opposes the Motion for Summary Judgment. The Respondent raises the following defenses: (1) That it is entitled to a hearing on an unfair labor practice complaint as a matter of right, and that in any event the Board's published rules do not provide for summary judgment; (2) that the certification is invalid because of various erroneous factual and legal determinations by the Regional Director in the representation case and the Regional Director's improper denial of a hearing to the Respondent on material factual issues.[2]

[2] In connection with its opposition to the motion for summary judgment the Respondent also filed a motion moving the Trial Examiner to recommend to the Board in his Decision that the

It is clear that all material issues of fact and law as to jurisdiction, the appropriateness and composition of the unit, voter eligibility, the validity of the election and the certification, and the merit of the Respondent's contentions in those respects, have already been decided by the Regional Director or the Board. Copies of correspondence attached to the General Counsel's Motion for Summary Judgment, the authenticity of which is not challenged by the Respondent, establish that in letters to the Respondent dated April 28 and June 1, 1967 the Union requested the Respondent to meet with it for the purposes of collective bargaining, and that on May 8 and June 9, 1967 the Respondent by letter declined the Union's request on the ground that the Decision and Direction of Election, the Supplemental Decision and Certification of Representative, and the Board's denial of the Respondent's requests for review, were invalid.[3]

It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances not to permit litigation before a Trial Examiner in an unfair labor practice case of issues which were

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Board reopen the representation case, (3-RC-4023) and consolidate it with the present unfair labor practice case (3-CA-3245). Administrative or official notice has been taken of the representation proceeding. Consolidation is therefore unnecessary. Since the Respondent's motion states that the Respondent has simultaneously filed a similar motion with the Board, the motion to the Trial Examiner is unnecessary to bring the matter to the Board's attention.

[3] The Respondent in its Response to the Motion for Summary Judgment denies the authority of the Trial Examiner to require the Respondent to admit or deny the authenticity of correspondence attached to the General Counsel's motion. However, Respondent has not denied their authenticity, although specifically requested in the Order to Show Cause to indicate whether it did so. Under such circumstances authenticity is deemed to be established. *Banco Credito Y Ahorro Ponceno*, 167 NLRB No. 52, fn. 2.

or could have been litigated in a prior related representation proceeding.[4]

No newly discovered or previously unavailable evidence is offered here by the Respondent, nor has it established the existence of special circumstances warranting re-examination of the previous determinations. It being established that the Union is the certified bargaining representative and that the Respondent has refused to bargain with it, there are no issues litigable before me or to be resolved by hearing. In such circumstances no hearing is required.

Where there are no material issues to be resolved there is no requirement for an evidential hearing and summary judgment or judgment on the pleadings is authorized and appropriate. As the Board said in the case of *Clement-Bluthe Companies*, 168 NLRB No. 24:

> "In its statement in opposition to the General Counsel's Motion [for Summary Judgment], Respondent contends that it is entitled to an evidentiary hearing as a matter of right, and, alternatively, that it is entitled to a hearing, at least in the circumstances of this case. We find these contentions without merit.
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> "Respondent is not entitled to a hearing as a matter of right. Where no litigable issues are raised, the Board may entertain and rule upon motions for judgment on the pleadings or motions for summary judgment. . . . Such a motion may be made at any time prior

[4] *Macomb Pottery Company, et al.*, 157 NLRB No. 124; 376 F.2d 450 (C.A. 7, 1967); *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71. *See Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as revised January 1, 1965, sec. 102.67(e), 102.69(e).

to hearing, during a hearing, or following hearing, so long as made before the issuance of a decision by a duly-appointed Trial Examiner."

Respondent's contrary contention was recently and specifically rejected by the Court of Appeals in the case of *N.L.R.B.* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 179 (C.A. 6, 1967). There the Court said:

> "Respondent also claims that it was unlawfully denied a hearing on these same issues in the unfair labor practice charge under direct review herein. Section 160(b), Title 29 U.S.C. provides:
>
> > '. . . The person complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint.'
>
> "This requirement, respondent argues, has not been met because it was not permitted to relitigate its objections previously considered by the Board in the certification proceedings. However, it is a well established principle of law that the Board is bound by its own prior determinations in representation proceedings, and is not required to grant a hearing on representational issues ancillary to an unfair labor practice charge, unless the party requesting such a hearing has some newly discovered evidence. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, rehearing den., 313 U.S. 599; *N.L.R.B.* v. *National Survey Service, Inc.*, [361 F.2d (C.A. 7)]; *N.L.R.B.* v. *B. H. Hadley, Inc.*, 322 F.2d 281 (C.A. 9). A party, in the absence of newly discovered evidence, is entitled to only one op-

portunity to question the Board's certification procedures. To require that the Board reopen and reconsider a matter that was subject to prior consideration would unnecessarily prolong the controversy, and prevent the orderly settlement of labor disputes. Not having presented any newly discovered evidence, the Board was not required, in the present unfair labor practice proceedings, to grant respondent a hearing on its objections to the certification procedures."

To substantially the same effect is *N.L.R.B.* v. *Worcester Woolen Mills Corp.*, 170 F.2d 13, 16 (1 C.A. 1948), where the Court said:

". . . an issue covered and decided in unit proceedings cannot as of right be relitigated in a subsequent unfair labor practice proceeding. If such an issue is to be relitigated in a subsequent unfair labor practice proceeding once it has been canvassed in a certification proceeding it is up to the party desiring to do so to indicate in some affirmative way that the evidence offered is more than cumulative. Otherwise a single trial of the issue is enough. . . ."[5]

This policy is applicable even though no formal hearing on objections has been provided by the Board in the repre-

[5] See also *Neuhoff Bros., Packers, Inc.* v. *N.L.R.B.*, 362 F.2d 611, 613 (5 C.A. 1966); *Macomb Pottery Company, et al.*, 157 NLRB 1616, enf'd 376 F.2d 450 (7 C.A. 1967); *Krieger-Ragsdale & Company, Inc.*, 159 NLRB No. 53 and cases there cited, enf'd 379 F.2d 517 (7 C.A. 1967); *N.L.R.B.* v. *Lawrence Typographical Union*, 376 F.2d 643, 651 (10 C.A. 1967); *E-Z Davies Chevrolet*, 161 NLRB No. 121; *Union Bros., Inc.*, 162 NLRB No. 140 and cases there cited; *Metropolitan Life Insurance Co.*, 163 NLRB No. 71; *Red-More Corporation d/b/a Disco Fair*, 164 NLRB No. 93; *Harry T. Campbell Sons' Corporation*, 164 NLRB No. 36; *Ore-Ida Foods, Inc.*, 164 NLRB No. 64; *Continental Nut Co.*, 164 NLRB No. 72.

sentation proceeding. Such a hearing is not a matter of right unless substantial and material issues are raised.[8] The cases cited by the Respondent (*N.L.R.B.* v. *KVP Sutherland Paper Co.*, 356 F.2d 671 (C.A. 6, 1966) and *N.L.R.B.* v. *Bata Shoe Co.*) do not negate this proposition. They merely hold that where there *are* substantial and material issues a hearing is required.

In these circumstances the prior findings of the Board constitute, at this stage of the proceeding, the law of the case. There are thus no issues litigable before me or to be resolved by hearing and summary judgment is therefore appropriate and entered.

On the basis of the record established I make the following further findings:

I. The Business of the Respondent

Respondent is a New York corporation engaged in the manufacture of truck bodies at plants in Athens, New York; Sherman, Texas; and Sturgis, Michigan. The Respondent annually purchases and transports to each of these plants in excess of $50,000 worth of goods and materials from outside the respective states.

The Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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[8] *O.K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd 297 F.2d 74 (C.A. 5, 1961). And see *Air Control Window Products, Inc.*, 335 F.2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B.* v. *Bata Shoe Co.*, 377 F.2d 821, 826 (C.A. 4, 1967).

III. The Unfair Labor Practices

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at the Employer's Athens, New York, truck manufacturing plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

On February 17, 1967, a majority of Respondent's employees in the appropriate unit selected the Union as their collective-bargaining representative in a secret-ballot election conducted under the supervision of the Regional Director of Region 3 of the National Labor Relations Board.

On April 14, 1967, the Regional Director, pursuant to authority vested in him by the National Labor Relations Board, after consideration of the Respondent's objections to the above-described election, certified the Union as the exclusive collective-bargaining agent of the employees in the said unit.

At all times since on or about April 14, 1967, and continuously to the present, the Union has been the representative for the purpose of collective bargaining of the employees in the said unit, and, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On April 28 and June 1, 1967, the Union requested the Respondent to bargain collectively with it with respect to rates of pay, wages, hours of employment, and other terms

and conditions of employment, as the collective-bargaining representative of Respondent's employees in the appropriate unit.

On May 8 and June 9, 1967, Respondent refused and continues to refuse to recognize and bargain with the Union as such representative.

By thus refusing to recognize and bargain with the Union the Respondent has refused to bargain collectively in violation of Section 8(a)(5) of the Act and has interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record in the case, I recommend that the Board issue the following:

ORDER

A. For purposes of determining the effective period of duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[7]

B. Olson Bodies, Inc., formerly Grumman Allied Industries, Inc., Athens, New York, its officers, agents, successors, and assigns, shall:

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[7] The purpose of this provision is to ensure that the employees in the appropriate unit will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F.2d 600 (C.A. 5, 1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F.2d (C.A. 10, 1965).

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees employed at the Employer's Athens, New York, truck manufacturing plant excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as the exclusive collective-bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive representative of the employees in the appropriate unit described above, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Athens, New York, truck manufacturing plant copies of the attached notice marked "Appendix".[5]

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[5] In the event that this recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

Copies of said notice, on forms to be furnished by the Regional Director for Region 3, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from receipt of this recommended Order, what steps it has taken to comply herewith.[*]

Dated at Washington, D.C. December 6, 1967

/s/ Charles W. Schneider
Trial Examiner

[*] In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 3, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
AND IN ORDER TO EFFECTUATE THE POLICIES OF
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, as the exclusive bargaining representative of all the following employees:

All production and maintenance employees employed at our Athens, New York, truck manufacturing plant excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT interfere with the efforts of said Union to negotiate for or represent the employees in the appropriate unit as the exclusive collective-bargaining representative.

WE WILL bargain collectively with the Union as the exclusive representative of the employees, and if an un-

derstanding is reached we will sign a contract with the Union.

GIBSON BOARDS, INC.,
FORMERLY
GRUMMAN ALLIED INDUSTRIES, INC.

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 4th Floor, The 120 Building, 120 Delaware Avenue, Buffalo, New York 14202 (Tel. No. 842-3112).

UNITED STATES OF AMERICA

BEFORE THE

THIRD REGION

Case No. 3-RC-4023

GRUMMAN ALLIED INDUSTRIES,

Employer,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Petitioner.

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election, an election by secret ballot was conducted in the above case on February 17, 1967, under the direction and supervision of the undersigned with the following results:

Approximate number of eligible voters	225
Void ballots	—
Votes cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO	110
Votes cast against participating labor organization	109
Valid votes counted	219
Challenged ballots	1
Valid votes counted plus challenged ballots	220

Challenges are sufficient in number to affect the results of the election.

The petition in this case was filed on September 27, 1966.

On February 27, 1967, Employer filed timely objections to the conduct of the election, and to conduct of the Petitioner affecting the results of the election. Since the challenged ballot was sufficient in number to be determinative, in accordance with Section 102.69, Series 8, as amended, of the Board's Rules and Regulations, the undersigned has duly investigated the challenge and the objections and makes the following findings and determinations.

THE CHALLENGE

WILLIAM DAVENPORT was challenged by the Board Agent who conducted the election since his name was not on the eligibility list. The Employer contends Davenport is a plant clerical employee and eligible to vote. The Petitioner contends Davenport is a liaison man between the engineering and drafting departments and is not part of the production and maintenance unit, and is not eligible to vote.

The unit in which the election was directed in the instant case is "All production and maintenance employees employed at the Employer's Athens, New York truck manufacturing plant, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act." Both parties agree that engineers and draftsmen do not belong in the unit.

Davenport has worked for the Employer since February, 1950. Up to some time in 1962 Davenport worked at various jobs in the production shop. In 1962 Davenport was transferred into the shop office located in the Plant #2 production building, and called the Production Control Office. Davenport's principal function during his initial tenure in the shop office was to make up master cards for each com-

ponent part that went into a truck body. This was a system which had just been inaugurated by the Employer in line with its plan to institute master bills of material for use in ordering materials both at the Athens plant, and at its recently opened Sturgis, Michigan and Sherman, Texas plants. Davenport obtained the information which appeared on the master card from engineering drawings, and if there was no drawing for a particular part he would physically measure the part in the production shop and make up a master card for that part with a part number. At the same time Davenport would bring this information to the Engineering Department where they would make up a drawing for the part.

Around August or September, 1964, the Employer decided to locate Davenport physically in the Engineering Department Office. The Employer states that the reason for this was that this would allow him direct access to the records located in the engineering area, and make the operation more efficient by eliminating walking time between the shop office and the engineering office. The Employer states that the preliminary work performed by the shop clericals in helping the engineering personnel to complete their engineering drawings and breakdowns was substantially completed and the engineering department now had the breakdown information in good order on the engineering prints and it was possible to begin preparing the bills of materials which was one of the principal goals of the Employer when it set up the new production control system. The records from which the information is obtained for these bills of material are located in the Engineering Office, so Davenport was given a desk in the Engineering Department Office, and when in July, 1966 the Engineering Department Office was moved from Plant #2 to Plant #1, Davenport was also moved. Another reason for the move was to give

Davenport ready access to records and files necessary in connection with problems arising on the production line as described below.

At present Davenport spends about 30% of his time making out the previously mentioned bills of material, which list all the parts that go into a larger part of the truck body. Copies of these bills of material go to the accounting office; the purchasing office; the production control office; the machine shop foreman; to the Sturgeon and Sherman plants; and to the layout foreman. Davenport has not made up a master card in about a year or a year and a half and these are made up by employees located in the shop office. Davenport states that when he first went into the Engineering Department office he had to frequently go back and forth to the shop office to tell the employees located there where the master cards were and things of that nature, but after about 2 or 3 months he informed Plant Manager David Simmons that they could now handle the work on their own.

However, he still has occasion to be in telephonic contact with the shop office personnel about two or three times a day for a total of about ½ hour a day. These calls are mainly to discuss new parts and problems in connection with these parts. In addition Davenport spends about 25 to 30% of his time performing the following duties. A foreman from the production shop will call the engineering department if he has a problem with a particular part, as for example, if a part did not fit correctly into the truck body or sub-assembly. This could occur for a variety of reasons such as if the production line was working with an old part number when there was subsequent substitution or change in design of the part; or the part was not fabricated to the correct dimensions; or the tooling was worn

out; or the original tooling was incorrect. The production foreman will call either Davenport or Engineer Harold Turner. Generally, Davenport will go to the production line and obtain the necessary information to bring back to Turner, including taking measurements of the part and comparing them with the measurements on the prints and bills of material. Davenport does not have authority to tell the foreman to make the necessary corrections so he must bring the information to Turner who will make the decision as to what has to be done. The problem involved might be too complicated for Davenport, in which case Turner himself will go out to the production line, or bring Davenport with him. In any case it is Turner who decides which of them will handle the problem. The remainder of Davenport's time is spent in filing for his own personal use. When Davenport is on vacation Turner or one of the other engineers or draftsmen will perform his duties except that they will not make out the bills of material.

At present there are two employees located in the shop office, Fred Riesel and William Peters. They are supervised by Simmons. Both were included in the unit in the Decision and Direction of Election. Davenport is hourly paid, and earns 6% more than the highest paid of the two mentioned shop clericals. Five production employees earn as much as Davenport, and 11 earn from 2 to 7% more than he does, exclusive of Foremen, and Assistant Foremen. He receives time-and-a-half for overtime, as do the production employees including the plant clericals, and works overtime when the production shop is scheduled to work overtime, as do the plant clericals. Davenport was told at the time he was located in the Engineering Department office that when the production shop was scheduled to work overtime, if he did not have enough work to do of his own, he could go to the production line and work on the line.

Since that time, Davenport has been sent to work overtime under a production foreman on one or two occasions at which time Davenport assembled prints on new production lines in book form, a job normally performed by the foreman. On the other occasions when Davenport worked overtime he did work of his own. He obtains his Thanksgiving turkey, and Christmas bonus with the shop personnel. His hours are the same as the shop personnel. He has a time card but writes his time in rather than punch a time card. The production shop employees punch a time card, but the shop clerical employees write time in.

Davenport's time card series is the same as the engineers' and draftsmen. When Davenport was first moved to the Engineering Department office, the shop clericals punched a time clock. On one occasion within a week after the move, Davenport worked overtime and could not punch out because the door was locked which led to the area where the time clock was located. The next day Davenport informed Turner of his problem, and Turner said he would take care of it. Davenport was then given a time card series similar to the engineers' and draftsmen. The Employer states that this was also done for convenience in the distribution and collection of time cards, since Davenport is located in the office with the engineers and draftsmen. The Employer also states that when the eligibility list was prepared the clock numbers of the employees in the engineering and draftsmen area were not run off, and that was why Davenport's name did not appear on the eligibility list.

The Employer contends that Davenport is supervised by Simmons, and that Turner does not have any supervisory authority over Davenport or over any of the engineers or draftsmen. However Davenport himself states that while Simmons is his supervisor, Turner also gives him things

to do, and that when he receives instructions from Turner he does what Turner tells him to do. Davenport also states that in two emergency situations when he had to leave work early, it was Turner whom he informed of the necessity for leaving. Also on those occasions as well as occasions when he had to work non-scheduled overtime, it was Turner who initialled his time card, and Simmons states that he has given Turner authority to do this in such situations. Other than these situations Davenport's time card is not initialled. In addition as noted above, it is Turner who gives Davenport most of the day-to-day work assignments and directions, when necessary. Davenport also stated that if Simmons wants Davenport to do something he will ask Turner if it is all right for Davenport to go and do it, and that Simmons has relayed work assignments for Davenport through Turner. The Employer also states that Turner has been ill for periods of time, and that for this reason Davenport, as well as the other engineers and draftsmen, have been told to help him out as much as possible.

Besides Davenport and Turner, also located in the engineering office area are Chief Engineer Clayton Reed, four draftsmen and two secretaries. When in the engineering office, Davenport utilizes the same washroom facilities as do the other male employees who work in that office.

As mentioned above there are two employees in the shop clerical office located in the main production area, Plant #2. Their main duties, as fully set forth in the record of the representation case hearing conducted in the instant case, are to prepare a weekly schedule of truck bodies to be completed, and record day to day completions. Beisel also prepares route cards for placing of parts, which cards are brought to the production line. These cards are in addition to the master cards referred to previously above

There are certain factors in this case which show a similarity between the interests of Davenport and those of the production shop employees and the shop clerical employees. He is hourly paid. He is paid time-and-a-half for overtime, and works overtime when the shop personnel are scheduled to work overtime. His benefits are similar to those of the shop personnel, and there are production shop personnel who earn as much and some who earn more than he does. He is in daily telephonic contact with the shop clericals. Furthermore, it is clear that Davenport is not an engineer or draftsman and does not have the training to be one.

On the other hand his duties appear to be mainly in support of the engineering department personnel. Thus the Employer states that one of the reasons he was located in the engineering department office was so that he could be nearer to and have ready access to records necessary to prepare the bills of material, and also necessary in connection with the work he performs on problems that arise on the production line. While it is true that Davenport does have to go to the production line in performing these latter duties, the work he does perform is work that is done by engineers or draftsmen when he is on vacation, and in fact he does at times go with Turner when this work is performed. It is significant that Davenport's contacts with the production shop are made through foremen. Indeed, the Employer states that one of the reasons Davenport was placed in the engineering department office was so that the time of the engineers or draftsmen would not be taken up with this work. The fact that he performs this work which would otherwise be performed by engineers or draftsmen is an indication that Davenport's duties and interests are more closely allied with the engineering department office, rather than with the production shop or

shop clerical office. *Williams Furnace Co.*, 158 NLRB No. 82, footnote 1 (ruling on experimental mechanic Bond), 62 LRRM 1135.

Moreover, in addition to Davenport's physical location in the engineering department office, it is apparent from the evidence that Davenport's immediate supervisor is Engineer Harold Turner. He receives his day-to-day instructions from Turner. It is Turner who decides whether or not the complexity of the production line problems require that Turner himself or Davenport can handle them. Turner has been authorized to initial Davenport's time card when this initialling is necessary. Furthermore it is clear that Davenport himself understands that he is expected to obey any instructions given to him by Turner. The undersigned finds that the fact that Davenport may have been asked to assist Turner because of Turner's protracted illnesses does not detract from Turner's authority over Davenport. On the contrary, there is no evidence of any supervisory authority exercised over the shop clericals by anyone other than Plant Manager Simmons. It also appears that the work of the shop clericals is much more intimately connected with and related to the production work than is Davenport's. They must bring the route cards out to the manufacturing line, and maintain daily records of truck bodies completed, and weekly schedules of truck bodies to be completed. Furthermore they are physically located near the production line, and have daily contact with the production line employees in conjunction with their duties.

The undersigned also attaches significance to the fact that Davenport was given a time card series with the engineers and draftsmen shortly after he was moved into the engineering department office. Though the Employer contends this was erroneous, it would seem that the error

would have been corrected prior to now—over two years after Davenport's placement in the engineering department office. The fact that the Employer gave him this time card series is an indication that it considered him part of the engineering department office.

On the basis of the foregoing and the entire investigation, the undersigned concludes and finds that Davenport's principal duties and interests are more closely allied to those of the engineering department and determines that he should be excluded from the production and maintenance unit, and therefore sustains the challenge to his ballot. *Dempster Brothers, Inc.*, 154 NLRB 688, 690, 60 LRRM 1006.

OBJECTION No. 1

"The Employer by telephone and telegram requested that employees who were eligible to vote in the election but who were sick and would be unable to be present in person to vote be permitted to cast ballots either by absentee ballot or in their homes in the presence of the representatives of the Board and the Employer's and Petitioner's observers on the date of the election, either prior thereto or subsequent thereto. This request was denied. The Employer contends that under the circumstances this ruling was prejudicial. The ruling resulted in a number of eligible employees being unable to vote which would be sufficient to affect the result in the election. It is undisputed that these employees were eligible to vote in the election. Their inability to be present at the plant where the election was conducted was known prior to the election and it would have imposed no hardship on either the Board or the Petitioner to permit these employees to vote in a manner not requiring their

presence at the plant. The refusal to permit their ballots to be cast resulted in an election in which those who were unable to vote were sufficient in number to affect the result in the election."

The Board has long held that only employees who present themselves in person at the polls shall be eligible to vote in manually conducted elections. *Hagen Manufacturing Company, Inc.*, 100 NLRB 1321, 1322; *The Ann Arbor Press*, 88 NLRB 391, 395. Accordingly, the undersigned hereby overrules Objection No. 1.[1]

OBJECTION No. 2

"Prior to the election the Union engaged in conduct affecting the results of the election in that it intimidated, coerced, threatened, made promises, bribed and attempted to intimidate, coerce, threaten and bribe employees eligible to vote in the election in an attempt to influence their votes in the election."

On March 9, 1967 Petitioner made a Motion to Dismiss Objection No. 2 on the grounds that it did not contain the statement of reasons as set forth in Section 102.69 of the Board's Rules and Regulations. Subsequent to the filing of the objections herein the Employer submitted evidence in support thereof which would justify the conduct of an investigation. As the objections satisfy the Board's rulings on specificity and evidence was submitted by the Employer, the undersigned hereby overrules Petitioner's Motion to Dismiss Objection No. 2. *Atlantic Mills Servicing Corporation of Cleveland, Inc.*, 120 NLRB 1284.

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[1] This ruling hereby disposes of Petitioner's Motion to Dismiss Objection No. 1, filed on March 9, 1967.

In support of this objection, Employer relies on incidents alleged to have involved three employees.

With regard to one employee Employer contends that certain union committee members harrassed, threatened and coerced him to the point where he suffered a nervous breakdown resulting in hospitalization at the time of the election and thereby denying him the right to vote. The employee related one incident before the election in which another employee was alleged to have told him that he could be subpenaed and brought to the courthouse for changing his mind and being against the union. The employee refused to reveal the name of the other employee involved. The employee also stated that he overheard certain other conversations between other employees in which he imagined they were talking about him, though his name was never mentioned, and that in these conversations, he could not say for sure they were talking about him, but had it in his mind that they were. Again the employee refused to reveal the names of the other employees involved. The Employer produced another witness who stated that he was told by this employee who these other employees were, but not which of these other employees were involved in which conversations. He named three employees. Two of these other named employees were on the Union's in-plant organizing committee. All of these named employees deny making any such statements, and there is no evidence that the Petitioner or any of its agents were in any way responsible for any of the alleged statements, or condoned or ratified them. In view of the foregoing, and particularly as the employee involved refused to state who made the alleged statements and was not even certain that all but one of these conversations were directed at him, the undersigned finds that there is insufficient evidence that all ex-

cept one of these conversations, even if made, were in any way directed at the employee involved and no evidence that the Petitioner, or any of its agents were responsible for any of the statements, or condoned or ratified them. *N. B. Liebman & Company, Inc.*, 112 NLRB 88.

With regard to the second employee, the Employer contended that on the morning of the election, which took place February 17, 1967, this employee was told by another employee that when the union vote was over she was going to be let go. The employee states that this other employee told her he had heard that someone wanted to put someone on working with her. She states that this was all she was told and that the union was not mentioned. The employee who made the statement to her corroborates her as to his conversation with her, and states that in making the statement he was merely repeating what he had been told by a Company foreman. The employee who made the statement was on the Petitioner's in-plant organizing committee, but there is no evidence that in making the statement he was acting as an agent of the Petitioner. The undersigned hereby finds the statement did not in any way constitute a threat, nor was it intended to do so, and that furthermore there is no evidence that the Petitioner or any of its agents were in any way responsible for the statement, or condoned or ratified it. *N. B. Liebman & Company, Inc.*, supra.

With regard to the third employee the Employer contends that the Petitioner gave him a letter of recommendation to a Union official in Detroit, Michigan, in order to bribe him to vote in favor of the union in the election. The employee involved worked his last day for the Employer on the day of the election, and prior thereto had told employees at the plant that he was moving to Michigan after he left the Employer. The investigation revealed that around Monday, February 13, 1967 Petitioner's Interna-

tional Representative, Robert Ormsby, and two employee members of Petitioner's in-plant committee met with the employee in question at a luncheonette in Catskill, New York. The employee in question himself stated that there was a discussion of the fact that he was going to Michigan, and where he was going, but there was no discussion about his voting, and no one asked him to vote for the union. He states that during the conversation Ormsby said he would write a letter of recommendation for him to take to Michigan, and he replied that was all right, and it might help but he was not going to use it if he did not have to. The employee stated that when Ormsby spoke of the letter of recommendation he said something to the effect, "you will probably see it our way," but that he did not consider this as asking him to vote for the union. He states that nobody asked him how he was going to vote, or asked him to vote for the union, but that he "felt" the letter of recommendation was made to get him to vote for the union. Ormsby states that it was the employee himself who brought up the subject of the letter, by asking for it, at which time Ormsby said he would get it for him. The employee was given the letter on the morning of the election, February 17, 1967. The letter was prepared and signed by International Representative Anthony Merino. It is clear from the above, that regardless of whether the employee did or did not ask for the letter of recommendation before it was proffered by International Representative Ormsby, at no time was it conditioned on how the employee was going to vote in the election, or even on whether or not he did vote in the election. The undersigned thereby finds that it was merely a friendly gesture on the part of the Petitioner, and not given in exchange for his vote for the Petitioner. *H. W. Lay & Company, Inc.*, 122 NLRB 1386, 1389.

Accordingly, the undersigned hereby overrules Objection No. 2.

SUMMARY

Accordingly, in view of the entire foregoing, the undersigned finds the Employer's objections do not raise substantial or material factual issues with respect to the conduct of the election, and they are hereby overruled.

The undersigned further determines that the challenge to the ballot of Davenport be sustained.

CERTIFICATION OF REPRESENTATIVE

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named Employer, in the unit described below, as their representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment:

UNIT: All production and maintenance employees employed at the Employer's Athens, New York, truck manufacturing plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Signed at Buffalo, New York on this 14th day of April, 1967

On behalf of the National Labor Relations Board.

MERLE D. VINCENT, JR.
Regional Director
Third Region
The 120 Building
120 Delaware Avenue
Buffalo, New York 14202

APPENDIX D

The relevant Constitutional provision is the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§151 *et seq.*) are as follows:

> *Sec. 3 (b)* The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall

not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . .

Sec. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8 (a) It shall be an unfair labor practice for an employer—

• • • • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9 (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and

that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

• • • • •

Sec. 9 (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act* . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . .

The relevant provisions of the Board's Rules and Regulations are 29 C.F.R. §§102.67 and 102.69. They provide in pertinent part:

Sec. 102.67 *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal transfer of case to Board; proceedings before the Board; Board action.*

(a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine

whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. . . .

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver may issue a notice to election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

• • • • •

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

• • • • •

Sec. 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*

* * * * *

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. . . . If the election has been conducted pursuant to a direction of election issued following any proceeding under § 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, . . . or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. . . .

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 238

OLSON BODIES INC., formerly GRUMMAN ALLIED INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA (UAW)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The first question presented—whether the Board is required to grant plenary review of a determination made by its regional director in a representation proceeding, pursuant to the delegation permitted by Section 3(b) of the National Labor Relations Act, before that determination may serve as the basis for an unfair labor practice finding and order—is essen-

tially the same as that presented in *Magnesium Casting Company* v. *National Labor Relations Board*, No. 370, 1970 Term. The Board has not opposed the petition in No. 370 because the decision of the First Circuit in that case, answering this question negatively, conflicts with the decision of the Second Circuit in *Pepsi-Cola Buffalo Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676, certiorari denied, 396 U.S. 904.

In the present case, a different panel of the Second Circuit[1] concluded that plenary Board review was not required. It distinguished *Pepsi-Cola* on the ground that the court "was there dealing with an issue, whether distributors were employees or independent contractors, which * * * 'is difficult and requires a fine-drawn balancing of facts and law,'" while the "questions here were the refusal to arrange for absentee or home voting by ill employees and the correctness of the inference the Regional Director had drawn from largely undisputed facts relating to the work of a single employee" (Pet. App. 7a).

The validity of the distinction drawn by the Second Circuit in this case is not a question of sufficient importance to justify further review. Thus, if the Court were to deny the petition in No. 370, it should also deny this petition. If, on the other hand, the Court grants the petition in No. 370, the distinction would become unimportant if the Court upheld the

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[1] The panel consisted of Judges Friendly, Smith, and Feinberg. Only Judge Smith was on the *Pepsi-Cola* panel.

view of the First Circuit, since *Pepsi-Cola* would then lose all vitality; and the distinction would similarly become equally unimportant if the Court adopted the *Pepsi-Cola* rule as the Second Circuit originally formulated it. Accordingly, the Court should defer ruling on the first question presented until it has decided No. 370.

2. The remaining questions present no issue warranting review by this Court. The second question (Pet. 2) simply challenges the Board's upholding the Regional Director's refusal to supplement the usual manual ballot procedures by providing for absentee or home voting by four employees who were away because of illness. Such a decision, which is in accordance with well-settled Board precedent and was sustained by the court of appeals, is well within the allowable discretion vested in the Board for the purposes of conducting representation elections. See *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330-331, 333; *IT&T Corp.* v. *National Labor Relations Board*, 294 F. 2d 393, 394-395 (C.A. 9).

The third question (Pet. 2-3)—whether the Company was entitled "to a hearing where there are material and substantial disputed issues of fact"—is not presented on this record. The Board's rules provide for a hearing on exceptions to a report on challenges and objections where "substantial and material factual issues" are raised. 29 C.F.R. § 102.69(c). The Regional Director's decision concerning Davenport's status in the unit (Pet. App. 29a-37a) involved no issue of credibility. The decision turned, as the court

of appeals noted (Pet. App. 6a), on the inference to be drawn from largely undisputed facts, and neither the Board nor the court of appeals were advised of any significant additional material that could be presented. See *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408, 416 (C.A. 3).[2] Accordingly, the Board properly invoked its "rule against relitigation" in the ensuing unfair labor practice proceeding of issues determined in the prior representation proceeding. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 161-162.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JULY 1970.

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[2] Contrary to petitioner's contention (Pet. 18-19), neither the record nor the Regional Director's resolution of the challenge indicated that the statements of any affiants unknown to the Company were considered in reaching that conclusion.

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SUPREME COURT, U. S.

AUG 5 1970

E. ROBERT SEAVER, CLERK

IN THE

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October Term, 1970

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Petitioner,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE U. A. W.— INTERVENOR

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IN THE

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No. 238

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NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Respondents.

MEMORANDUM OF INTERVENOR IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Involved

As will appear from the "Statement of the Case" (*infra*) the "Questions Presented" by the Petitioner [1] are not based on the facts of the case.[2]

1. The National Labor Relations Board, did study the findings and decisions of the Regional Director before denying Petitioner's request for review.

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[1] Petition p. 2.

[2] References made herein are to the Appendix filed in the Court below or to the Petition filed herein, and they will be so designated.

As the Court of Appeals in *N. L. R. B.* v. *Magnesium Casting Company*, First Circuit, decided May 21, 1970 said:

> "The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for Review, 29 C. F. R. #102.67(d), and on that basis it concluded that the Company's claims . . . presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contention."

In the instant case, too, the company in its Request for Review submitted all the evidence to the Board (Appendix, pp. 148-222), which the Board undoubtedly studied before it denied the Request for Review.[3]

2. No timely request has been made for absentee or home ballots on behalf of the "alleged" ill employees.

The question posed should be:

Did the Regional Director commit a prejudicial and reversible error, under the circumstances, by denying the request of the employer for a change in the mode of balloting?

3. There were no "material and substantial disputed issues of fact", which would entitle the petitioner to a hearing.[3]

The question posed should be:

Is a denial by the N.L.R.B. of a Request for Review, which request does not raise any material and substantial issues of fact, but is based solely on a disagreement with a Regional Director's decision on uncontested issues, a denial of due process?

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[3] Petition, p. 2.

Statement of the Case and Proceedings Below

On September 27, 1966, a petition for certification pursuant to Section 9(c) of the National Labor Relations Act was filed by the Intervenor. A hearing was held before a hearing officer of the National Labor Relations Board, on October 28, 1966, November 4, November 16, and November 17, 1966.

At the hearing much testimony was taken as to individual employees. The company wanted to include and the Petitioner sought to exclude the "assistant foremen (William Hally, Dale Barkman, Orlando Greco, Walter Palmer, Joseph Lowe, and Raymond Reischer) and the chief inspector (Oliver Dedrick) as supervisors within the meaning of the Act; the cleaning women (Bertha Moore, Sally Withbeck, and Jane Waldron), the coffee girl (Eleanor Cassaiels), a technician (Walter Wortenberg), and Walter Sutter, Thomas Brennan, and Walter Dorpfeld as not having a community of interest with the production and maintenance employees; manufacturing liaison man (Donald Shelly) as a professional employee; and clerical employees (William Peters, Fred Biesel, and William Stacy) as office clerical employees."[4]

The status of Davenport was not raised by the employer, or the union, and no testimony was taken at the hearing as to his status. Nor did his name appear on the eligibility list submitted by the employer to the National Labor Relations Board prior to the election.

The election was scheduled for February 17, 1967, at the company's plant. On February 15, 1967, at 5:37 p.m., the employer sent a telegram to the Regional Director, requesting home or mail voting for fifteen employees, some

[4] Appendix p. 23 (Decision and Direction of Election).

of whom "have been ill for several months".[5] The request was denied by the Regional Director.

At the election, eleven of the fifteen employees on whose behalf the employer sent the telegram, appeared and voted. Four did not.

At the election, Mr. Davenport appeared at the polls, and was challenged by the representative of the National Labor Relations Board, on the ground that his name did not appear on the eligibility list.

The result of the election was: 110 votes for the union and 109 against.

The company filed timely objections to: 1. the challenge of Mr. Davenport; 2. the refusal of the request to grant home ballotting to the "ill-employees"; and 3. alleged union's conduct effecting the results of the election.

The Regional Director "has duly investigated the challenge and the objections"[6] and made the following findings and determinations:

1. "That Davenport's principal duties and interest are more closely allied to those of the engineering department, and . . . he should be excluded from the production and maintenance unit", and therefore sustained the challenge to his ballot.[7]

2. Overruled objections Nos. 2 and 3.

In his investigation of the challenge, the Regional Director took numerous affidavits and interviewed various witnesses of the employer, all of which affidavits were in support of the company's objections to the challenge.

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[5] Appendix p. 128-129.

[6] Appendix p. 135.

[7] Appendix p. 143.

Although the Regional Director stated in his supplemental decision and Certification of Representative that: "The Petitioner contends Davenport is a liaison man between the engineering and drafting departments, and is not part of the production and maintenance unit . . .",[8] the record does not show that he either interviewed or took affidavits from any of the union representatives as to their claim. The only document setting forth the contention of the union is: The charging party's motion to dismiss the objections to the conduct of elections, dated March 6, 1967.[9]

The Regional Director based his findings of fact and conclusions of law solely on the evidence and affidavits submitted by the employer in opposition to the challenge.

Following the certification, the company filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative on the issue of the challenge and the vote of the ill employees, and asked for a hearing. It did not contest his decision as to the "conduct of the union affecting the result of the election."[10]

On May 23, 1967, the Board denied the company's request as raising "no substantial issues warranting review."[11]

The union requested collective bargaining on April 28, 1967, and again on June 1, 1967, and the company refused.

Charges of refusal to bargain were thereupon filed by the union and a complaint was issued by the Board.[12]

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[8] Appendix p. 135.

[9] Appendix p. 1, "3. 6. 67-charging party's motion. . . .

[10] Appendix p. 148-223.

[11] Appendix p. 223.

[12] Appendix p. 227-232.

In its answer the company admitted its refusal to bargain on the ground that the certification was "improper".[13]

On August 17, 1967, the N.L.R.B. moved for summary judgment.[14]

On August 22, 1967 the Trial Examiner issued an order directing the parties to show cause why summary judgment should not issue".[15]

On September 21, 1967, the company filed a response to general counsel's motion for summary judgment.[16]

On December 6, 1967, the Trial Examiner issued his decision finding the company guilty of violation of Section 8(a)(5) of the Act and recommending an order to be issued by the Board.[17]

On January 8, 1968, the company filed exceptions to Trial Examiner's decision.[18]

On April 23, 1968 the Board affirmed and adopted the decision of the Trial Examiner, in which it states:

> "The Board has considered the Trial Examiner's decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner [19] (170 N. L. R. B. No. 34).

Upon failure of the Respondent to comply with the Board order, an application was made by the Board for

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[13] Appendix pp. 232-235 #8 p. 234.

[14] Appendix pp. 235-252.

[15] Appendix p. 252.

[16] Appendix pp. 253-270.

[17] Appendix pp. 10-21.

[18] Appendix p. 22-31.

[19] Appendix p. 32.

enforcement, which application was granted on February 3, 1970, by Friendly, Smith and Feinberg, Circuit Judges, after hearing arguments of all parties.

On March 4, 1970, a petition by the company for review *en banc* was denied by Honorable J. Edmund Lumbard, chief judge of the Court of Appeals, second circuit.

POINT I

The Board was not required to grant a review of the Regional Director's findings of fact and conclusions of law.

Section 3(b) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. #151 et seq.) which gives the Board the authority to delegate to its regional directors its power under Section 9, provides:

> ". . . except that upon the filing of a request therefor with the Board by any interested person, the Board *may* review any action of a regional director delegated to him under this paragraph . . ." (emphasis supplied).

It is, respectfully submitted, that the above provision is permissive and discretionary with the Board, and not mandatory, as the Petitioner herein would have the Court determine.

a) The Petitioner, apparently, concedes the following grounds provided for in Sec. 102.67 of the Board's Rules and Regulations for granting a request for review of a Regional Director's decision:

> "(1) That a substantial question of law or policy is raised because of (i) the absence, or (ii) a departure from, officially reported Board precedent.
>
> "(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the

record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy" (Petition, p. 7).

It is, respectfully submitted, that none of the prerequisites for a review set forth in the above rule, is applicable herein.

(1) There is no substantial question of law or policy because of (i) the absence of, or (ii) a departure from, officially reported Board precedents. On the contrary: the Board, in refusing the request for a review of the Regional Director's Supplemental Decision and Certification of Representatives adhered to its established policy that a hearing is not a matter of right unless substantial and material issues are raised. *O. K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd 297 F.2d 74 (C.A. 5, 1961); *Air Control Window Products, Inc.*, 335 F.2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality". Also *N.L.R.B.* v. *Bata Shoe Co.*, 377 F.2d 821, 826 (C.A. 4, 1967).

In *N.L.R.B.* v. *K.V.P. Southerland Paper Co.*, 356 F.2d 671 (C.A. 6, 1966) and *N.L.R.B.* v. *Bata Shoe Co.*, 377 F.2d 821, 9 C.A. 4, 1967) the Board did grant hearings because there were substantial and material issues.

The only issue raised by Petitioner herein as to the challenged ballot was whether the Regional Director's conclusion in upholding the challenge was reversible error. The evidence shows that the Regional Director in investigating the challenge took affidavits from the challengee and from various company officials who were opposed to the challenge. He disclosed his evidence to the company at-

torneys and permitted them to file additional affidavits to correct any possible omissions and to offer additional information. His decision was based solely on the evidence contained in the affidavits of the company. No contrary evidence or affidavits were submitted by the union except for a general statement.[29] Under the circumstances, there was no need for a hearing. There were no contradictory statements of fact to be resolved at a hearing. Nor were there any additional facts submitted which were not previously included in the affidavits. A hearing under these circumstances would have been merely a repetition of the evidence offered in the affidavits on which evidence the Regional Director relied. Such a hearing would be a mockery of court procedure and a useless waste of energy and time.

(2) Although the decision of the regional director might have affected the wishes and rights of the petitioner, there is not a shred of evidence that he decided a substantial issue of fact. What he did was to apply his expertise knowledge to make a determination solely on the uncontradicted facts submitted by the company, as to whether Mr. Davenport was or was not part of the bargaining unit.

(3) No ruling in connection with the proceeding has resulted in prejudicial error. The fact that the ruling was not to the liking of the company, is not in itself error.

(4) Nor did the petitioner show *any* reasons, let alone compelling ones, "for reconsideration of an important Board rule or policy".

b) The attempt of the Petitioner to claim a conflict between the various Courts of Appeal on the question of a hearing is inapplicable to the issues at bar. All circuit Courts are in agreement on facts similar to the instant case.

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[29] Footnote 9 supra.

In *Pepsi-Cola Buffalo Bottling Co.* v. *N. L. R. B.*, 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969), the issues were entirely different from those in the instant case. The *Pepsi-Cola* case involved a determination whether a group of distributors were employees or independent contractors which "is difficult and requires a fine-drawn balancing of facts and law". In the instant case, there was only the question of whether, upon the facts submitted and relied upon, a given employee was or was not a member of the bargaining unit. In the *Pepsi-Cola* case there was conflicting evidence on the challenges. In the instant case there was no conflict of evidence. All the evidence was submitted by the employer.

In fact, the Court of Appeals of the Second Circuit in granting enforcement herein differentiated the instant case from that of *Pepsi-Cola*:

> "Accepting *Pepsi-Cola* we do not regard it as making remand automatic whenever the Board has declined to review a decision of a regional director under powers delegated to him pursuant to #3(b). This court was there dealing with an issue, whether distributors were employees or independent contractors, which, as the Board conceded, 'is difficult and requires a fine-drawn balancing of facts and law,' 409 F.2d at 679. See *N. L. R. B.* v. *United Ins. Co.*, 390 U.S. 254 (1968). The questions here were the refusal to arrange for absentee or home voting by ill employees and to correctness of the inference the Regional Director had drawn from largely undisputed facts relating to the work of a single employee. These are the very types of issues where the Board, like an appellate court, would properly defer to the judgment of the tribunal of first instance—and also the kinds of issues where the desire of Congress to help the Board with its workload, see remarks of Senator Goldwater, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1856, would apply with peculiar force. We are convinced that a remand here for review of

> the Regional Director's decision would, in contrast to Pepsi-Cola, be "an idle and useless formality," *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 6 (1969) (opinion of Mr. Justice Fortas), accomplishing nothing save further delay."

N. L. R. B. v. *Magnesium Casting Co.*, — F.2d — (1st Circuit, decided May 21, 1970) although criticizing the Court of Appeals decision in *Pepsi-Cola* (*supra*) reaches the same conclusion as the Second Circuit did in the instant case.

In the *Magnesium* case, the question involved the supervisory status of three employees. The company's request for Review of the Regional Director's decision was denied by the Board "as raising no substantial issues warranting review". The company refused to bargain with the union. The Trial Examiner granted a motion for summary judgment, which was affirmed by the Board.

The Court granting enforcement, stated:

> ". . . [T]he Regional Director's determination should be sustained if supported by substantial evidence."
>
> . . .
>
> ". . . [if] 'deference to expertise' and 'substantial evidence' mean anything in this area of labor law it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *NLRB* v. *Metropolitan Life Insurance Co., supra;* compare Illinois State Journal-Register, Inc., v. NLRB, 412 F.2d 37 (7th Cir. 1969); *NLRB* v. *Little Rock Downtowner, Inc., supra* at 1089; *NLRB* v. *Swift and Company, supra* at 563. Metropolitan Life presented a much clearer case of 'supervisory' status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence."
>
> . . .

". . . [T]he slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C. #153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members 'any and all of the powers which it may exercise', and then, as amended, provides that '[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] . . . to determine the unit appropriate for the purposes of collective bargaining . . . except that the Board may review any action of the Regional Director . . .' Taken together, the two provisions reflect a Congressional decision to allow the Board —within the specified limits to permit its delegates to act in its stead."

"The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers, it is not required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *e.g., Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U.S. 146(1941); *Amalgamated Clothing Workers* v. *N. L. R. B.,* 365 F.2d 898, 902-904(D. C. Cir. 1966); Riverside Pres, Inc. v. NLRB, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination when not set aside by the Board—is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded."

. . .

". . . [T]he section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determination sufficiently

> comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding."
>
> . . .
>
> "The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for Review, 29 C. F. R. #102, 67 (d), and on that basis it concluded that the company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions."

It is respectfully submitted that if there are any conflicts between the 1st and 2nd circuit Court of Appeals, they deal with the issue of difficult and "fine-drawn balancing of facts and law". Both circuits fully agree on the application of existing law to the facts in the instant case.

The case of *N. L. R. B.* v. *Clement Blythe Company*, 451 F2d 78 (1969) decided September 9, 1969, U. S. Court of Appeals Fourth Circuit, is also distinguished from the case at bar.

In that case, the issue was the propriety of an election generally. The company claimed that no election should be held because the company was in the process of growth, and the complement of its employees did not reflect the actual number of prospective employees.

It requested a review by the Board of the Regional Director's decision and order of election. The issues there were basic.

In the instant case, although there was much testimony and disagreement on the scope of the unit as well as the inclusion of various individuals in the bargaining unit, the employer did not except to the decision of the Regional Director on the bargaining unit, or to the Direction of Election. Its objections were solely to the decision of the Regional Director of a challenge and his refusal to change the mode of balloting, the request for which was not timely.

The decision of the Board in denying requests for review on the ground that there were "no substantial issues warranting review" was made after a study by the Board of the material submitted by the Respondent. The Board under Section 3(b) of the National Labor Relations Act could and did rely on the findings of the Regional Director and affirmed his findings and decisions to the same affect as it does with reference to findings of fact and conclusion of law of a Trial Examiner.

While there may be a conflict of opinions among various circuits in cases of "fine-drawn balancing of facts and law", there is no conflict among the circuits on the application of Section 3(b) of the National Labor Relations Act, as amended, to the facts in the instant case, and certiorari does not lie.

POINT II

The denial of special voting provisions for ill employees was proper.

The petition for certification in the instant case was filed on September 27, 1966. Upon refusal of the employer to consent to an election, hearings were held on October 28, 1966, November 4, November 16, and November 17, 1966. A decision to conduct an election was made on January 16, 1967, and the election was scheduled for February 17, 1967,

at 2:15 p.m. at the plant of the employer in Athens, New York.

Neither at the hearings nor any subsequent conferences in preparation for the election did the employer raise the question of ill employees.

On February 15, 1967, at 5:37 p.m., the counsel for the employer having its office in New York, wired the Regional Director in Buffalo a request to permit fifteen ill employees to vote by absentee ballots or at their homes. Eleven of the employees resided in Athens proper and four resided in Catskill, New York, a village adjacent to Athens. Part of the telegram stated that "eight of these employees have been out for at least a month, and some employees have been out for over six months".[21]

The telegram was received by the director during business hours on February 16, 1967, one day before the scheduled election, and the request was denied. At the election eleven of the fifteen "ill" employees appeared and voted.

The petitioner concedes that the Board's general policy is to refuse requests for absentee ballots, at least, in cases where no timely request was made. *McFarling Bros., Midstate Poultry and Egg Co.*, 123 N.L.R.B. 1384, 1392 (1959); *Franklin Stores Corp. of Daly City*, 117 N.L.R.B. 793, 795 (1957); *Red Owl Stores Inc.*, 114 N.L.R.B. 176, 177 (1955).[22]

It exhibits, however, a change of heart and opinion in this case. In its Request for Review of Supplemental Decision and Certification of Representatives, the employer sets forth the following ground:

> "(2) That there are compelling reasons for *reconsideration* of an important Board policy—namely, that where illness of eligible employees prevents

[21] Appendix p. 128.

[22] Petition p. 14

> them from appearing in person at a manually conducted election and knowledge of such inability to appear in person is known prior to the election on sufficient notice, these employees should be permitted to vote in a manner other than in person."[25]

Thus, the petitioner admits that what it seeks is a reconsideration by the Board of an important policy.

In its petition herein, however, it seeks to convince the Court that the Board *policy* is to grant such exceptions, if timely notice is given.

Assuming that the petitioner's method of negative-positive determinations of Board policy, to wit: ascribing to the Board a positive policy of granting special methods of voting, where a request is timely made, merely because in several cases the Board relied on the "timeliness" of the requests as one of the reasons for its refusal to grant them, the question arises whether the request in the instant case was timely.

As it appears from the contents of the telegram, the Company was aware of the illness of many of the employees mentioned therein for a period of over one month, and in several instances, for a period of over six months. Were it really interested in protecting the rights of the employees to vote, why has it failed to raise the question at the hearing? Why has it failed to raise the question soon after the Decision and Order of election was made, which was a full month prior to the date of the election? Why did the company wait with its request till the last day before the election? Was it part of its planned strategy of delaying and obstructing the rights guaranteed to its employees by Section 7 of the Act, instead of protecting their rights, as it claims?[26]

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[25] Appendix pp. 148-149.

[26] It is now nearly four years since the petition for certification was filed and the company is still not negotiating with the union.

Besides the names of the fifteen employees, listed in the telegram, the company failed to produce any affidavits of the individuals, or doctors' statements setting forth the nature of their alleged "illness". It is conceivable that the "illness" of the employees involved, as was the case with at least eleven of them, was of such nature that they could have appeared in person to vote. The telegram did not give any inkling of the nature of the illnesses.

In order for the Regional Director to comply with the telegraphic request, he would have had to adjourn the election, thereby delaying still further the opportunity of the employees to select a bargaining representative. Under the circumstances and in view of the fact that the employer was, apparently, aware of the alleged illnesses, its waiting with the request till the last day was certainly untimely, and was properly denied.

Furthermore, assuming that its request was granted, on the basis of the contents of the telegram, and it turned out that the claimed illnesses were of such a nature that they did not prevent the employees from appearing to vote, the granting of the request would certainly have been grounds for setting aside the election [23].

As the court below said in its decision:

> "We cannot say that the Regional Director's refusal to supplement the usual manual ballot procedures in this election in a small up-state New York town was such a violation of the rights of the employees as to render judicial intervention appropriate. See *International Tel. & Tel. Co.* v. *N.L.R.B.*, 294 F. 2d 393 (9 Cir. 1961). . . ."

The cases cited by the petitioner in support of its contention that the general Board policy is to permit home

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[23] In none of the numerous proceedings since the election did the company submit any affidavits or other documents showing the nature of the alleged illness and the reason for the employees' not having appeared to vote.

balloting (*Alterman-Big Apple Inc.*, 146 NLRB 1078 (1936); *E. I. Dupont de Nemour and Co.*, 79 NLRB 835 (1957) and *Verges Van Linens, Inc.*, 162 NLRB 1239 (1967)), are exceptions to the Board policy and as such they underline the Board's general policy.

Vaca v. Sipes, 386 U.S. 171 (1967) and *Humphrey v. Moore*, 375 U.S. 335 (1964) involve interpretations of Section 301 of the Labor Management Relations Act and are inapplicable herein.

The other cases cited by the petitioner (*Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964)) involve the constitutionality of election statutes and are also inapplicable to the case at Bar.

POINT III

The Regional Director was not required to conduct a hearing on the issues presented.

On this point, too, the Petitioner, is misreading the decision of the Circuit Court, in asserting that the Court held "that a hearing was not required where the Regional Director did not disclose certain of the evidence on which he relied".[20]

This assertion is not only incorrect, but it attempts to subvert the facts and impugn certain irregularities and improper motives to the Regional Director.

The Court below in dealing with this issue said:

> "Respondent was given access to the affidavits taken by the Regional Director and opportunity of which it fully availed itself, to submit additional

[20] Petition p. 17.

> material. No issue of credibility is involved; decision turned on the inference to be drawn from largely undisputed facts, *and neither the Board nor we have been told of significant additional material that could be presented*". (emphasis supplied).

The Court below was rather lenient and mild in referring to "significant additional material". In fact, no *additional* material of any kind was ever presented by the company to the Regional Director or the Board besides the numerous affidavits submitted by the company to the Regional Director, which formed the sole basis for his determination. There was no evidence on which the Regional Director relied other than the affidavits submitted by the Petitioner.[27] There were no contradictory statements of fact requiring examination or cross-examination of witnesses. All affidavits were supplied in opposition to the challenge and none in support thereof. The only thing a hearing could accomplish is a repetition of the contents of the numerous affidavits and supplementary affidavits submitted by the company.

The Petitioner alleges that: "The fact remains that the Regional Director's determination was based in part on evidence obtained from witnesses whose testimony has never been made available to the company".[28]

The Petitioner's Request for Review of the Supplemental Decision and Certification of Representatives describes the nature of the Regional Director's investigation:

> ". . . The representative of the Regional Director took an affidavit from Robert Loar on March 20, 1967 and an affidavit from William F. Davenport the following day. These affidavits were taken without any opportunity for counsel for the employer to amplify or correct the affidavits by additional direct examination or cross examination. Upon an analysis of the

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[27] Appendix p. 182-222.

[28] Petition p. 18.

resulting affidavits, it became apparent that the material contained therein was neither accurate nor complete. *With the permission of the representatives of the NLRB, the Employer attempted to deal with this problem by submitting additional affidavits.* Subsequently, the Employer submitted additional affidavits from David W. Simmons, the Plant Manager; Harold Turner, an engineer; Walter Kramm, the Divisional Controller; and Fred Reisel, one of the two other shop clericals. Supplementary affidavits were also submitted from Mr. Lazar and from Mr. Davenport. No attempt was made by the investigator to take further statements from any of the persons from whom affidavits had been supplied to the Board. *The Employer has no knowledge as to what additional affidavits, if any, were obtained by the investigator with respect to the duties of William F. Davenport.* It is submitted, however, that the Employer does not know of anyone who could have better knowledge than the individuals named above who supplied affidavits to the Board"[29] (emphasis supplied)

The Request for Review then deals "with the serious inaccuracies, omissions and errors of fact contained in the clearly erroneous conclusion on the substantial factual question of the nature of Davenport's duties."[30] Neither in the Request for Review or in any other documents does the Petitioner allege any facts additional to those contained in the affidavits nor claim any newly discovered facts or evidence justifying a hearing.

The case of *Goldberg* v. *Kelly*, 90 S. C. 1011, decided on March 23, 1970, cited by Petitioner, involves the right of welfare recipients to a hearing in the event their benefits are withdrawn.

The case there dealt with relief recipients "who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance". The

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[29] Appendix pp. 151-152.

[30] Appendix p. 155.

petitioner in the instant case cannot compare itself to the relief recipient. It could and did afford experienced professional help. Nor does it lack the educational attainment to write effectively.

In *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963), the petitioner was denied admission to practice law by the Appellate Division of New York, which denial was based on information supplied by adverse individuals. Petitioner demanded, on several occasions, to be given the opportunity to confront his accusers and cross-examine them, which was denied.

The court at page 103 stated:

> "We have emphasized in recent years that procedural due process often requires consultation and cross-examination of those whose word deprives a person of his livelihood".

Justice Goldberg in his concurring opinion which is referred to by the petitioner, stated:

> "[A]s I understand the opinion of the court, [it] does not mean that in every case consultation and cross-examination are automatically required . . . the circumstances will determine the necessary limits and incidents implicit in the concept of a 'fair' hearing. *Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant and it is plain . . . that . . . the recommendation is predicated thereon and reasonably supported thereby, then . . . the conclusion may [not] be properly challenged on due process grounds . . .*" (p. 107-108) (emphasis supplied)

CONCLUSION

The petition does not warrant the issuance of a writ of certiorari.

New York, N. Y.
August , 1970

Respectfully submitted,

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SUPREME COURT, U. S.

AUG 31 1970

E. ROBERT SEAVER, CLERK

No. 238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

OLSON BODIES INC., formerly GRUMMAN ALLIED INDUSTRIES, INC.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA (UAW)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO CONSOLIDATE

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MOTION TO CONSOLIDATE

Pursuant to Rule 43(5) of the Rules of this Court, petitioner Olson Bodies Inc. respectfully moves this Court for an order consolidating this case with *Magnesium Casting Company* v. *NLRB*, No. 370, 1970 Term, for argument.

The reasons for granting this motion are:

1. Point I of the Petition in this case and the Petition in No. 370 involve the same question of law, that is, whether the National Labor Relations Board is required to give plenary review to a Regional Director's determination of the unit appropriate for purposes of representation under the National Labor Relations Act before entering an unfair labor practice order based on that determination. The

Solicitor General, in his memorandum and in No. 370, has pointed out the similarity of issue in the two cases and has maintained that the conflict of opinion between the Second Circuit in *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB*, 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 906 (1969), as modified by its decision herein, and the First Circuit in No. 370 is of sufficient importance to merit a definitive ruling by this Court.

2. In addition to presenting the same issue of plenary Board Review as does No. 370, this case raises the crucial subordinate question whether, if plenary review is required, it is required in all instances of unfair labor practice charges or merely where there are issues which are labeled as "difficult and requir[ing] a fine-drawn balancing of facts and law".

If the Court grants certiorari in No. 370, it should also grant certiorari in this case and consolidate the cases for argument. By so doing, the Court will be able to efficiently settle all aspects of this very important question.

WHEREFORE, petitioner prays that the Court, upon granting certiorari in both cases, order the cases to be consolidated and be argued together, or on such terms as the Court may prescribe.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF OLSON BODIES INC.

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National Labor Relations Board and International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY MEMORANDUM OF OLSON BODIES INC.

Petitioner Olson Bodies Inc., formerly Grumman Allied Industries, Inc. (hereinafter the "Company"), respectfully submits this memorandum in reply to the memoranda of the Solicitor General, on behalf of the National Labor Relations Board, and of the UAW.

I.

The Solicitor General in his memorandum has suggested that a decision of this Court in *Magnesium Casting Company* v. *NLRB*, No. 370, 1970 Term, might be dispositive of

Point I of the Petition in the instant case.* As the Solicitor General notes (p. 2), the question presented—whether the Board is required to review a Regional Director's underlying representation decision in a subsequent unfair labor practice proceeding—is one which should be decided by this Court.

If this Court grants certiorari in No. 370 and adopts the view taken by the First Circuit, this, of course, would be dispositive of Point I of the instant Petition. If, however, this Court grants certiorari in No. 370 and adopts the contrary view taken by the Second Circuit in *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB*, 409 F. 2d 676 (2d Cir.), *cert. denied*, 396 U.S. 906 (1969), there would still remain a question of sufficient importance to warrant definitive determination by this Court—whether plenary Board review is required in all cases or only where the issue involved is said to be "difficult and requires a fine-drawn balancing of facts and law." If this crucial subordinate point is not decided by this Court, any decision that plenary Board review is required may well be readily circumvented and thus prove illusory in practice. The result is likely to be extensive litigation as to when, and under what circumstances, plenary review is required by the Board.

In this respect it should be noted that the First Circuit has already rejected the proposition that Board review should be limited to "difficult" cases:

> "We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of 'supervisory' status, the question seemed difficult only with regard to one of the three assistant foremen. . . . Surely that approach would frustrate rather

* The Solicitor General in his memorandum (pp. 1-2) states that the first question presented herein "is essentially the same as that presented in *Magnesium Casting Company* v. *National Labor Relations Board*."

than foster the expeditious disposition of cases intended by Congress." (74 L.R.R.M, at 2239)

As the First Circuit pointed out, the status of a single employee can raise problems of law and fact which are just as difficult as those involved in determining the status of a larger group of workers as employees or independent contractors, the issue in *Pepsi-Cola*.

II.

The Company's contention that absentee balloting should have been permitted under the circumstances of this case cannot be lightly dismissed as the memoranda of the Solicitor General and the UAW attempt to do. Counsel for the UAW has suggested that the cases cited in the Company's Petition represent exceptions to a stated Board policy of not permitting absentee balloting rather than examples that such balloting is permitted generally. Although in some instances the Board has suggested that absentee balloting is not to be generally employed, the very large number of cases in which it has been allowed indicates that the Board has little actual regard in practice for its statement of general policy.

On the other hand, if it is indeed the Board's general policy not to allow such absentee voting in circumstances such as those of the instant case, the Board has abused "its discretion when it knowingly allows eligible employees to be disenfranchised . . . whose vote would change the results of an election to decide upon a bargaining agent." *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F. 2d 933, 944 (5th Cir. 1959).

Neither *NLRB* v. *A. J. Tower Co.*, 329 U.S. 325 (1946), nor *IT&T Corp.* v. *NLRB*, 294 F.2d 393 (9th Cir. 1961), cited at page 3 of the Solicitor General's memorandum,

contradicts the Company's position or even deals with the question involved in this case—whether the Board has abused its discretion by disenfranchising eligible but ill employees where a request was made for absentee ballots *prior* to the election. Both those cases dealt with facts which came to light *after* the election, a very different situation than involved herein.

The UAW in its memorandum (p. 17) suggests that regardless of Board policy, the Company's request for absentee ballots was not timely. At no time throughout these proceedings has the Board ever disputed the timeliness of the Company's request, and as this Court noted in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."

Similarly, in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965), this Court stated that:

> "[T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalization for agency action. . .'"

It should also be pointed out that the Company's request for absentee balloting was prompted by an inquiry from a sick employee, and that the request was telephoned to the Regional Director immediately following the inquiry.

III.

The Company does not quarrel with the proposition that a hearing is not required when there are no "substantial or material factual issues" in dispute. In the instant case, however, there is, at the very least, a disputed question of fact

involving Davenport's supervision. As noted in the Petition herein, the question of Davenport's supervision is critical because the Regional Director's conclusion that Davenport was not a plant clerical was based, in large part, on his finding that "Davenport's immediate supervisor is Engineer Harold Turner." Every affidavit known to the Company stated that Simmons was Davenport's supervisor. In the face of these affidavits, the only way that the Regional Director could have found that Turner was Davenport's supervisor was either to have disbelieved every affidavit or to have obtained information not made available to the Company. In either case, a hearing is required.

The Regional Director began his Supplementary Decision by stating that the Union contends that "Davenport is a liaison man between the engineering and drafting departments and is not part of the production and maintenance unit." The UAW in its memorandum would seem to suggest that this contention was made in "[t]he charging party's motion to dismiss the objections to the conduct of elections, dated March 6, 1967" (p. 5). However, the motion to dismiss (reprinted in full in Appendix A hereto) contains no such contention. The Company still has no idea how the Regional Director learned that the Union contended that Davenport was "a liaison man between the engineering and drafting departments," and neither the Solicitor General nor the UAW has provided anything resembling a satisfactory answer. The Company can only conclude, as it did in the Petition herein, that the Regional Director obtained such information from sources never disclosed to the Company. Denial of a hearing under these circumstances is a clear violation of due process.

CONCLUSION

For the reasons set forth herein and in the Petition, a Writ of Certiorari should issue.

Respectfully submitted,

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August 31, 1970

APPENDIX A

APPENDIX A

Motion to Dismiss Objections to the Conduct of Election and to the Conduct Affecting the Results of Election

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

Case No. 3-RC-4023

GRUMMAN ALLIED INDUSTRIES, INC.,

Employer,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Petitioner.

The undersigned, as attorney for the Petitioner herein, moves to dismiss the Objections to the Conduct of Elections and the Conduct Affecting the Results of Elections heretofore filed by the employer in the above matter on the following grounds:

1. Objection No. 1 is improper. The provisions of the National Labor Relations Act, as amended, as well as the Rules and Regulations of the National Labor Relations Board, do not provide or permit absentee voting or voting by proxy. The refusal of the Regional Director to permit such voting was proper and Objection No. 1 should be dismissed.

2. Objection No. 2 does not state any facts to be considered. It is merely a conglomeration of conclusions of law without one single allegation of fact in support thereof. The Rules, (Section 102.69) specifically provide that the Objection must contain a statement of the reasons. A conclusion of law without at least an alleged fact upon which to base such conclusion is insufficient both in the sense of being investigated by the Board agency or to reply by the adverse party.

Dated: New York, N.Y.,
March 6, 1967.

/s/ BENJAMIN RUBENSTEIN
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